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No. ..-....

IN THE

# Supreme Court of the United States

October Term, 1983

DON A. ALLEN, SR., STANLEY ARNOLD, HALE H. ASHCRAFT, JOHN C. BEGOVICH, RUTH CASEY, CLAYTON A. DILLS, FRANCES THELMA DONNELLY, PEGGY P. DONOVAN, F. DOUGLAS FERRELL, MYRON H. FREW, MARY C. GAFFNEY, CHARLES B. GARRIGUS, LUTHER E. GIBSON, BURT HENSON, RUTH HOLMES, PAUL J. LUNARDI, STANLEY PITTMAN, THOMAS M. REES, EDWIN J. REGAN, W. BYRON RUMFORD, SR., HAROLD T. SEDGWICK, PHILIP SOTO, WILLIAM F. STANTON, VERNON STURGEON, WILLIAM SYMONS, JR., HOWARD J. THELIN, JEROME R. WALDIE, ROBERT D. WILLIAMS, JOHN C. WILLIAMSON, GEORGE A. WILLSON, GORDON H. WINTON, JR., PEARCE YOUNG,

*Appellants,*

*vs.*

BOARD OF ADMINISTRATION OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM,

*Appellee.*

**ON APPEAL FROM JUDGMENT OF THE SUPREME COURT OF THE STATE OF CALIFORNIA.**

## JURISDICTIONAL STATEMENT.

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## Question Presented.

Where, for many years, the pension rights of public officers and employees have been upheld by the California Supreme Court as fundamental, vested contractual rights, protected by Article I, Section 10 of the United States Constitution, is there an issue of sufficient constitutional importance for this Court to consider when a judgment of the California Supreme Court fails to follow its own prior decisions and holds that such vested rights of a group of retired California legislators may be impaired by a state constitutional amendment and statute which took effect after the legislators had retired?

## Parties to the Proceeding.

The caption of the case contains the names of all parties.

Appellants are former and retired California legislators, who are members of the California Legislators' Retirement System ("LRS"), or surviving spouses of such legislators. Appellants challenge, as constitutionally impermissible, the manner in which the retirement benefits paid to them through LRS have been and are being calculated.

Pursuant to California Government Code Section 9353, appellee Board of Administration of the Public Employees' Retirement System is the statutory administrator of LRS and is responsible for the payment of retirement allowances to appellants.

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*Appellants,*

*vs.*

BOARD OF ADMINISTRATION OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM,

*Appellee.*

## JURISDICTIONAL STATEMENT.

### Opinions Below.

The opinion of the California Supreme Court in this action is set forth in Appendix A; it is reported as *Allen v. Board of Administration*, 34 Cal. 3d 114, 665 P.2d 534, 192 Cal. Rptr. 762 (1983). The September 7, 1983 order of the Cal-

ifornia Supreme Court denying a Petition for Rehearing is set forth in Appendix B. The opinion of the California Court of Appeal is set forth in Appendix C.

**Jurisdiction.**

The judgment of the California Supreme Court at issue on this appeal holds that the provisions of the California Government Code and the California Constitution drawn into question in this action may be applied to appellants without impairing their vested contractual pension rights under Article I, Section 10 of the United States Constitution. Accordingly, this Court's jurisdiction is properly invoked pursuant to 28 United States Code Section 1257(2).[1]

Although the opinion of the California Supreme Court indicates that the case has been remanded for further proceedings, all substantive issues have been decided and the remand involves nothing more than ministerial acts. Thus, the challenged judgment of the California Supreme Court is final for purposes of 28 U.S.C. Section 1257(2). *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62 (1948).

The date of the entry of the judgment sought to be reviewed was July 11, 1983. Notice of this appeal (set forth in Appendix D) was filed on December 1, 1983, within 90 days of the California Supreme Court denial, on September 7, 1983, of a timely-filed Petition for Rehearing. This appeal is, therefore, timely. (28 U.S.C. Section 2101(c); Sup. Ct. R. 11.3.)

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[1]In the event that this Court determines that the instant action may not properly be presented to it as an appeal, it is respectfully requested, pursuant to 28 United States Code Section 2103, that the papers filed in support of an appeal be regarded and acted upon as a petition for writ of certiorari duly presented to this Court at the time such papers were filed.

**Relevant Constitutional and Statutory Provisions.**

The following constitutional and statutory provisions are at issue in this action: Article I, Section 10 of the United States Constitution; Article IV, Section 4 of the California Constitution; and California Government Code Sections 9359.1(a), 9359.11, and 9360.9. The full text of these provisions is set forth in Appendix E.

**Statement of the Case.**

Appellants are 32 retired legislators or surviving spouses of retired legislators who comprise all, or substantially all, of a group of retired legislators who are members of LRS; served in office while Sections 9359.1(a) and 9360.9 of the Legislators' Retirement Law ("LRL")[2] were simultaneously in force; and left office and retired prior to the 1967 term, which commenced January 1, 1967. At all times during appellants' incumbency in the Legislature, the basic monthly retirement allowance payable to retired members of LRS was governed by Section 9359.1(a) of LRL, which provides a "fluctuating" formula for calculation of such allowances. Pursuant to that formula, the retired legislator's monthly retirement allowance would be adjusted periodically to reflect, or fluctuate with, changes in the salary payable to incumbent members of the Legislature. In addition, during appellants' incumbency, the Legislature added Section 9360.9 to LRL which has provided, since it took effect in 1963, for automatic annual adjustment of retirement allowances in accordance with a formula designed to reflect upward changes in the cost of living.

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[2]The Legislators' Retirement Law is set forth in the California Government Code at Section 9350, *et seq*. Unless otherwise indicated, all section references set forth herein are to the California Government Code.

Following appellants' retirements, on January 1, 1967, Article IV, Section 4 of the California Constitution and Section 9359.11 of LRL became effective. For purposes of computing the basic monthly retirement allowances of legislators who had retired prior to the commencement of the 1967 term, Article IV, Section 4 and Section 9359.11 purport to limit the salary on which the retired legislators' retirement allowances are based. Thus, those provisions, if applicable to appellants, would substitute a "fixed" system of computation of the basic retirement allowance, frozen at a salary of $500 per month, in place of the prior fluctuating system provided by Section 9359.1(a).

At all times relevant to this litigation, appellee Board of Administration of the Public Employees' Retirement System (the "Board") has calculated appellants' retirement allowances in accordance with Article IV, Section 4 and Section 9359.11. Therefore, the Board has based their allowances on a fixed monthly salary of $500, as provided by Section 9359.11, rather than applying the fluctuating formula of Section 9359.1(a) which would reflect the salary payable to incumbent legislators. In addition, the Board has applied Section 9360.9 in providing required cost of living adjustments to the basic retirement allowances.

On February 21, 1980, appellants filed their Petition for Writ of Mandate with the Los Angeles Superior Court, seeking to compel defendant Board to recalculate their retirement allowances in accordance with the provisions of Sections 9359.1(a) and 9360.9, without giving effect to Section 9359.11 and Article IV, Section 4. In their Petition, as here, appellants contended that Section 9359.11 and Article IV, Section 4 cannot be applied to appellants without unconstitutionally impairing appellants' vested contractual pension rights in violation of Article I, Section 10 of the United States Constitution and Article I, Section 16 of the

California Constitution (the "Contract Clauses").

In essence, appellants argued that under well-established principles of California law, as expressly reaffirmed by the unanimous decision of the California Supreme Court in *Betts v. Board of Administration*, 21 Cal. 3d 859, 582 P.2d 614, 148 Cal. Rptr. 158 (1978), they had earned vested contractual rights to the pension benefits in effect upon the commencement of their employment (Section 9359.1(a)) as well as those conferred during their subsequent tenure (Section 9360.9), and that such vested contractual rights could not be diminished by applying Section 9359.11 and Article IV, Section 4, which took effect following appellants' retirements, in lieu of the more favorable Section 9359.1(a), in computing the basic retirement allowances to which Section 9360.9 must be applied.

On September 29, 1980, the Superior Court issued the peremptory writ of mandate sought by appellants, declaring that the provisions of Section 9359.11 and Article IV, Section 4 of the California Constitution could not be applied to appellants without unconstitutionally impairing their vested contractual pension rights in violation of the Contract Clauses. On November 22, 1982, the California Court of Appeal affirmed the judgment of the trial court in its entirety.

Thereafter, on July 11, 1983, the California Supreme Court reversed the judgment of the Superior Court and vacated the writ directed to appellee Board. The California Supreme Court held that the substitution of the fixed formula provided by Section 9359.11 and Article IV, Section 4 for computation of appellants' retirement allowances, in place of the fluctuating formula provided by Section 9359.1(a), did not constitute an impairment of contract in violation of Article I, Section 10 of the United States Constitution.

On July 22, 1983, appellants timely filed a Petition for Rehearing with the California Supreme Court, in which they

urged, as here, that, in order to reach a desired result, the California Supreme Court grossly distorted the reasoning and holding of its legally indistinguishable prior decision in *Betts v. Board of Administration, supra,* 21 Cal. 3d 859. The Petition for Rehearing was denied, and the order reversing the judgment of the Superior Court was entered on September 8, 1983.

## STATEMENT OF REASONS WARRANTING PLENARY CONSIDERATION OF THIS APPEAL.

### A. Appellants' Vested Contractual Pension Rights, as Established by California Law, Are Protected From Impairment by Article I, Section 10 of the United States Constitution.

In order that the protection of contractual rights accorded by Article I, Section 10 of the United States Constitution not be evaded or emasculated by state court decisions which impair contractual rights through improper constructions of state law, this Court retains the ultimate authority to determine independently whether or not a contract exists and, if a contract does exist, to determine the nature and extent of its obligations. *See Indiana Ex Rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938); *Pineman v. Oechslin*, 637 F.2d 601, 604 (2nd Cir. 1981). Nevertheless, "[a]s this Court has observed on numerous occasions, the [United States] Constitution does not create property interests. Rather it extends various procedural safeguards to certain interests 'that stem from an independent source . . . .' [Citations omitted]." *Leis v. Flynt*, 439 U.S. 438, 441 (1979). As explained more fully in *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972):

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Thus, in *Indiana Ex Rel. Anderson v. Brand, supra*, 303 U.S. 100, this Court reviewed a decision of the Indiana Supreme Court dismissing an application for a writ of mandamus to compel the respondent school trustee to continue the petitioner in employment as a public school teacher.

Petitioner contended that, having become a "permanent" teacher under the Indiana Teachers' Tenure Act as enacted in 1927 and prior to its amendment in 1933, she had a vested property right in her indefinite contract of employment which could not be impaired, by applying the 1933 amendment to her, without violating Article I, Section 10 of the United States Constitution.

Examining Indiana statutes and the decisions of the Indiana courts, this Court rejected the Indiana Supreme Court's conclusion that the 1933 amendment did not deprive petitioner of a vested property right and did not impair her employment contract in violation of Article I, Section 10. This Court emphasized that: "Until its decision in the present case the Supreme Court of the State [of Indiana] had uniformly held that the teacher's right to continued employment by virtue of the indefinite contract created pursuant to the [Indiana Teachers' Tenure] Act [of 1927] was contractual." *Id.* at 105. Accordingly, this Court reversed the challenged decision of the Indiana Supreme Court, holding that it was contrary "to the policy evinced by the Act of 1927, to its explicit mandate and to earlier decisions construing its provisions." *Id.* at 107.

As demonstrated more fully below, the vested contractual pension rights of appellants in the instant case, like the vested contractual rights at issue in *Indiana Ex Rel. Anderson v. Brand, supra,* have been long recognized under state law and have been protected from impairment by the Contract Clause of the United States Constitution.[3] And, as

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[3]As the California Supreme Court recognized in deciding this action, "even though a state may by constitutional amendment supersede its own constitutional protection for contracts, such modification and any law adopted pursuant thereto still must pass federal constitutional muster." *Allen v. Board of Administration, supra,* 34 Cal. 3d at 119 (citation omitted).

in *Indiana Ex Rel. Anderson v. Brand, supra*, the state court decision challenged by this appeal represents an improper and unwarranted departure from the applicable state court precedent, which must be reversed by this Court "in order that the constitutional mandate [of Article I, Section 10] may not become a dead letter." *Indiana Ex Rel. Anderson v. Brand, supra*, 303 U.S. at 100.

**B. Under Well-Established Principles of California Law, Appellants Have Vested Contractual Pension Rights to Pensions Computed Pursuant to Both Sections 9359.1(a) and 9360.9.**

The law of California on the nature of salary and pension rights of public officers and employees is vastly different than that of many other states and the federal system. A long line of California cases have firmly established that, under California law, "a public employee's pension rights are an integral element of compensation and a vested contractual right accruing upon acceptance of employment," and such rights are protected by the Contract Clause of the United States Constitution. *Olson v. Cory*, 27 Cal. 3d 532, 540, 636 P.2d 532, 178 Cal. Rptr. 568 (1980). *See also Lyon v. Flournoy*, 271 Cal. App. 2d 774, 76 Cal. Rptr. 869 (1969); *Frank v. Board of Administration*, 56 Cal. App. 3d 236, 128 Cal. Rptr. 378 (1976). The California Supreme Court zealously has guarded pension rights of public officers and employees, recognizing such rights to be "not only vested but [also] 'fundamental.' " *Strumsky v. San Diego County Employees Retirement Assn.*, 11 Cal. 3d 28, 45, 520 P.2d 29, 112 Cal. Rptr. 805 (1974). Indeed, the Court has imposed severe restrictions on legislation even temporarily impairing such vested rights due to a public emergency. *See Sonoma County Organization of Public Em-*

*ployees v. County of Sonoma*, 23 Cal. 3d 296, 591 P.2d 1, 152 Cal. Rptr. 903 (1979).

In *Betts v. Board of Administration, supra*, 21 Cal. 3d 859 (hereinafter "*Betts*"), which is controlling here, the California Supreme Court carefully analyzed and relied on numerous earlier decisions of the California courts in reaffirming the principles of California law which govern the nature and protected status of vested pension rights and the very narrow scope of permissible modifications to such rights. The factual and legal similarities between *Betts* and the instant case are striking. Both cases involve the construction and effect of Sections 9359.1 and 9360.9 of LRL and the effect of legislation, enacted subsequent to an LRS pensioner's termination of service, which purported to change a fluctuating formula provided by Section 9359.1 to a fixed formula.

Petitioner Betts was the State Treasurer during the period 1959-1967. During Betts' incumbency, the basic monthly retirement allowance provided for state officers by Section 9359.1(b) of LRL, similar to that provided by Section 9359.1(a) of LRL for legislators, was calculated based on a fluctuating formula, which tied the retirement allowance to the present salary of the officer holding the office which the pensioner last held prior to retirement.

During the incumbency of Betts and appellants, in 1963, the Legislature added Section 9360.9 to LRL to provide automatic annual cost of living increases of retirement allowances. Thus, from January 1964 until Betts left office in January 1967, Sections 9359.1(b) and Section 9360.9 were both in effect, providing two simultaneously applicable formulae for computing the amount of retirement allowances payable under LRL.

In 1974, after Betts left office but before his retirement in 1976, the Legislature amended Section 9359.1(b) to

change the method of computation of retirement allowances for elected constitutional officers. Pursuant to the amended Section 9359.1(b), which (like Section 9359.11) substituted a fixed formula in place of the prior fluctuating formula, the basic allowance was based on the highest compensation actually received by the retired officer during his term of office, rather than that received by the incumbent office holder.

In 1976, Betts retired and applied for his pension. The Board determined that Betts' pension should be computed under Section 9359.1(b), as amended in 1974, and Section 9360.9. Betts petitioned for a writ of mandate to compel the Board to compute his pension under the pre-1974 Section 9359.1(b) and Section 9360.9.

Examining these facts, the California Supreme Court concluded that the 1974 amendment to Section 9359.1(b) could not constitutionally be applied to Betts "because the amendment withdraws benefits to which he earned a vested contractual right while employed." *Betts, supra,* 21 Cal. 3d at 867. The Court emphasized that:

> [I]n the instant case, the 1963 enactment of Section 9360.9 [the cost of living formula] occurred *during* petitioner's term as Treasurer, which ran from 1959 to 1967; the 'fluctuating' system of benefit computation [provided by Section 9359.1] was also in effect during this entire period. An employee's contractual pension expectations are measured by benefits which are in effect not only when employment commences, but which are thereafter conferred during the employee's subsequent tenure.

*Betts, supra,* 21 Cal. 3d 866 (emphasis in original).

Concluding that Betts' "contractual pension expectations" were based on both the fluctuating formula of the pre-1974 Section 9359.1(b) and the cost of living formula

of Section 9360.9, the California Supreme Court stated that:

> For four years, petitioner provided his services under a statutory scheme which *simultaneously* included both computation methods. Under these circumstances, the 1963 enactment [Section 9360.9] cannot be deemed a 'comparable new advantage' offsetting the detriment represented by amendment of Section 9359.1 in 1974.
>
> . . . .
>
> We therefore conclude that the 1974 amendment to Section 9359.1 cannot constitutionally be applied to petitioner, because the amendment withdraws benefits to which he earned a vested contractual right while employed. No 'comparable new advantages' to petitioner appear in the plan which can offset the detriment he has suffered by replacement of a 'fluctuating' system. . . . Petitioner is therefore entitled to have his basic retirement allowance computed on the basis of section 9359.1 as it read when he left office in 1967. Under the formula therein provided, petitioner's basic pension benefit is to be determined periodically on the basis of the current Treasurer's salary, now $35,000 per year.

*Betts, supra,* 21 Cal. 3d at 867-68 (emphasis in original).

The California Supreme Court expressly acknowledged that its holding would confer on petitioner Betts a dual cost of living adjustment similar to that which must be conferred on appellants:[4]

> We fully recognize that the effect of our holding is that petitioner thereby receives the benefit of a *double*

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[4]The dual cost of living adjustment to which appellants are entitled is limited by an express "cap" provision set forth in Section 9359.1(a), which provides that pensions payable to retired legislators and their surviving spouses may not (with minor exceptions) exceed the current salary of a member of the Legislature.

> increment of increase, a troubling result. We can only observe that the Legislature must have intended to provide such benefits to constitutional officers serving between 1963 and 1974 because it left in effect both of the formulae during that 11-year period.

*Betts, supra*, 21 Cal. 3d at 867.

Moreover, prior to its decision in this action, the California Supreme Court reaffirmed both the rationale and result of *Betts*, recognizing that the result in *Betts* was compelled by analysis of the relevant pension statutes in the light of the applicable legal principles:

> We note that in *Betts* this court held the pensioner was entitled to both the benefit of a basic retirement allowance calculated as a proportionate part of the fluctuating salary of the incumbent in the office occupied by the pensioner and, additionally, a cost-of-living adjustment of the basic allowance. We stated then that the effect of the holding 'is that petitioner thereby receives the benefit of a *double* increment of increase, a troubling result.' . . .
>
> [In] *Betts* . . ., there was express legislative direction mandating the cost-of-living adjustment be applied to the fluctuating basic retirement allowance. (*Id.*, at p. 865.) It was thus necessarily held that since statutes establishing both the fluctuating basic retirement allowance and the cost-of-living adjustment thereto were in effect during the pensioner's term in office, he had acquired vested contractual rights to the dual benefits.

*Olson v. Cory, supra*, 27 Cal. 3d at 542-543 n.7 (citation omitted; emphasis added).

Both the reasoning and holding in *Betts* are controlling in the instant case. As in *Betts*, Section 9359.11 and Article IV, Section 4, if applicable to appellants, would impose a detriment on appellants by withdrawing benefits — that is, the advantage conferred by a fluctuating formula — to which

they had earned vested contractual rights during their service in office. *See Betts, supra,* 21 Cal. 3d at 864. However, it is uncontroverted that, like Betts, appellants served in the Legislature during the period when both the fluctuating formula provided by Section 9359.1(a) and the cost of living formula provided by Section 9360.9 were *simultaneously* in force. Thus, as correctly recognized in *Olson v. Cory, supra,* 27 Cal. 3d at 542-543 n.7, "there was express legislative direction mandating the cost-of-living adjustment be applied to the fluctuating basic retirement allowance." Moreover, "the 1963 enactment [Section 9360.9] cannot be deemed a 'comparable new advantage' offsetting the detriment represented by" the *subsequently* enacted Article IV, Section 4 of the California Constitution and Section 9359.11, the amendments which purport to change the fluctuating formula applicable to the calculation of appellants' basic retirement allowances to a fixed formula frozen at $500 a month. *Betts, supra,* 21 Cal. 3d at 864 and 867.

Under the controlling California precedent, appellants acquired vested contractual rights to both the fluctuating formula of Section 9359.1(a) and the cost of living formula of Section 9360.9 which were applicable simultaneously during their terms in office. Such rights, which were vested, matured pension rights, were not subject to detrimental change on appellants' retirements, and must be protected by the Contract Clause of the United States Constitution.

### C. The Specious Distinction Which the California Supreme Court Attempts to Draw Between *Betts* and the Instant Case Is Legally Insignificant and Improper.

The California Supreme Court's arguments to avoid the plainly controlling effect of *Betts* in order to reach a desired result are fatally deficient. In its effort to avoid the result

dictated by *Betts*, the Court relies heavily on *Lyon v. Flournoy, supra*, 271 Cal. App. 2d 774 (hereinafter "*Lyon*"). In *Lyon*, a retired legislator, who (unlike Betts and appellants) had not served in office when both the fluctuating formula of Section 9359.1(a) and the cost of living formula of Section 9360.9 were in effect, was held to have no "reasonable expectation" of receiving the benefit of both formulae.

Straining to distinguish the instant case from *Betts* and to analogize it to *Lyon*, the California Supreme Court states that:

> The primary basis for our determination that *Betts* reasonably was entitled to expect the benefit of both the fluctuating and cost-of-living provisions was the absence in his case of any factors militating against the reasonableness of that expectation such as were present in *Lyon* and are present here. There was no suggestion in *Betts*, for example, that the statutory scheme for pension enhancement of constitutional officers, like *Betts*, was not operating as originally designed. *Lyon* and the present case, on the other hand, are premised upon the discrepancy between the theoretical objective [*i.e.*, to provide for cost-of-living adjustments for retired legislators by calculating their pensions, pursuant to Section 9359.1(a), as a percentage of the present legislators' salaries, as periodically adjusted] and the actual operation of the legislators' statutory pension scheme [which did not, in fact, provide such cost-of-living adjustments due to a freeze of legislators' salaries during the period 1954 through 1964].

*Allen v. Board of Administration, supra*, 34 Cal. 3d at 123.

While it is beyond dispute that the factual distinction drawn by the California Supreme Court is correct, it is, quite simply, legally insignificant and cannot, as that Court has held, justify a different result in this action than in *Betts*.

Bluntly stated, it is absurd to suggest that, because constitutional officers (unlike legislators) did *not* suffer the hardship of a twelve-year salary freeze, they could "reasonably expect" to receive or should be entitled to receive greater benefits [a double cost-of-living increase] than legislators, who did suffer such a hardship. Yet, reduced to its essence, this is the incredible distinction drawn by the California Supreme Court to support a result in this case different from that in *Betts*. *See Allen v. Board of Administration, supra,* 34 Cal. 3d at 117-118, 123-124.

Moreover, in *Betts,* after thoroughly examining the factual background of *Lyon*, the California Supreme Court squarely held that the decision in *Lyon* was correct *only because* Lyon, unlike Betts (and appellants), had retired prior to the enactment of Section 9360.9.[5] Thus, Lyon had not served in office while Sections 9359.1(a) and 9360.9 were simultaneously in force and, therefore, had no reasonable expectation, objectively measured under the *Betts* standard, to dual benefits:

> In *Lyon*, accordingly, *after the member's retirement,* the cost-of-living formula in effect during his active service was replaced by another. The Court of Appeal was *therefore* [emphasis added] entirely correct in saying that the decedent had earned no contractual expectation *while in office* that he would receive the benefit of *both* systems. In contrast to *Lyon*, in the instant

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[5]The California Supreme Court obviously concluded that the impairment of vested contractual pension rights challenged in *Betts* was not permissible as a mere "technical impairment" which, under the applicable federal precedent, did not run afoul of the strictures of Article I, Section 10 of the United States Constitution. Thus, in *Betts*, the California Supreme Court did not rely on the federal cases cited in *Lyon, supra,* 271 Cal. App. 2d at 787, on which it now relies (*see Allen v. Board of Administration, supra,* 34 Cal. 3d at 119-120), to avoid the "troubling result" compelled in *Betts* (as in the instant case) by the controlling California precedent.

> case, the 1963 enactment of section 9360.9 occurred *during* petitioner's term as Treasurer, which ran from 1959 to 1967; the "fluctuating" system of benefit computation [provided by Section 9359.1] was also in effect during this entire period.
>
> . . . .
>
> . . . [W]e conclude that the prior version of section 9359.1 together with section 9360.9, enacted in 1963, form the basis by which petitioner's reasonable pension expectations must be measured.

*Betts, supra,* 21 Cal. 3d at 866-867 (emphasis in original, except where otherwise indicated).

Significantly, in deciding *Betts*, the California Supreme Court expressly considered and rejected the argument, which it now has accepted, that vested contractual pension rights turn on subjective "reasonable expectations":

> Thus, the Board argues, one 'cost of living' formula was simply replaced by another; petitioner, it urges, had no reasonable expectation when he left office that he would enjoy the 'double windfall' of the cost-of-living index formula provided by section 9360.9 *plus* the 'fluctuating' benefit adjustment, the increasing salary scale, mandated by the pre-1974 version of section 9359.1. Under the circumstances of this case [*i.e.*, where "petitioner provided his services under a statutory scheme which simultaneously included both computation methods" (*Betts, supra,* 21 Cal. 3d at 868)], the Board's contention cannot be sustained.

*Betts, supra,* 21 Cal. 3d at 865.

In summary, the California Supreme Court's distinction of the facts of *Betts* from those presented here, and its present reliance on *Lyon* as controlling in this action, reflect a facile effort to give "lip service" to the applicable California precedent, as plainly enunciated and reaffirmed in *Betts*, while improperly distorting the compelling reasoning

and controlling holding of *Betts*. There can be little argument that the result dictated by the well-established, objective *Betts* standard for measurement of appellants' vested contractual pension rights is one which the California Supreme Court would wish to avoid in the instant case. Indeed, in these times of "belt-tightening" for both state and local governments, the result compelled by the applicable legal principles is politically unappealing. Nevertheless, concern with a "troubling" result cannot justify the distortion of the relevant constitutional principles reflected in the California Supreme Court's decision in this action. To the contrary, the vested contractual pension rights of appellants must be accorded the protection guaranteed by Article I, Section 10 of the United States Constitution.

**Conclusion.**

For the reasons stated above, the decision of the California Supreme Court should be reversed.

Respectfully submitted,

WILLIAM H. LEVIT,
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## APPENDIX A.

### Opinion of California Supreme Court.

[L.A. No. 31702. July 11, 1983.]

DON A. ALLEN, SR. et al., Plaintiffs and Respondents, v. BOARD OF ADMINISTRATION OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM, Defendant and Appellant.

Counsel

Gerald R. Adams, Charles I. Gibbs, Donald M. Pach and Bullen, McKone, McKinley, Gay, Keitges & Pach for Defendant and Appellant.

Stroock & Stroock & Lavan, William H. Levit, Henry J. Silberberg and Margaret A. Nagle for Plaintiffs and Respondents.

William M. Bennett as Amicus Curiae on behalf of Plaintiffs and Respondents.

[34 Cal.3d 117]

Opinion

RICHARDSON, J.—The Board of Administration of the Public Employees' Retirement System (the Board) appeals from a judgment of the Los Angeles County Superior Court declaring that the restrictions of article IV, section 4 of the California Constitution and section 9359.11 of the Government Code (all further statutory references are to this code) may not constitutionally be applied in computing the retirement allowances of respondents, who are former state legislators or their surviving spouses. By its peremptory writ of mandate, the trial court ordered the Board to recalculate those retirement benefits in accordance with sections 9359.1, subdivision (a), and 9360.9, without giving effect to article IV, section 4, and section 9359.11. (The relevant portions of these enactments are set forth in an appendix to this

opinion.) For reasons hereinafter developed, we conclude that the trial court erred, and accordingly reverse its judgment and vacate the writ.

Respondents are 32 retired former legislators or their surviving spouses. Each of the legislators served in the Legislature during the 1963-65 terms and retired prior to the legislative term commencing January 1, 1967. Respondents are all current members of the Legislators' Retirement System (LRS). The Board is the statutory administrator of the LRS. (See §§ 9350.2, 9353.)

At least since 1949, the Legislators' Retirement Law (LRL) (§ 9350 et seq.) has provided that the basic requirement benefit of a legislator is an annual sum equal to 5 percent of the compensation payable to incumbent legislators at the time the retirement allowance falls due, multiplied by the number of years served by the legislator, not exceeding 15. (See § 9359.1, subd. (a).) In so defining such allowances, the LRL thus contemplated retirement benefits which would vary with current legislative salaries, presumably in order that retirees, like current legislators, could maintain a fairly constant standard of living despite fluctuations in living costs. Implicit in this scheme was the assumption that legislators' salaries periodically would be adjusted to reflect current costs of living.

When the LRL was adopted, legislators were receiving a salary of $100 per month for what essentially was part time employment. (See Cal. Const., former art. IV, § 2, repealed in 1966.) By constitutional amendments that monthly salary was successively increased to $300 in 1949 and $500 in 1954. (Before 1966 legislative salaries were fixed by the Constitution and could not be modified by the Legislature. (See *id.*, § 23b, repealed in 1966.).)

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In 1963, during respondents' incumbency, the Legislature adopted section 9360.9. That statute provided for the direct adjustment of retirement allowances to be paid retired legislators commencing in 1964 to reflect increases in the cost of living since 1954, with annual increases each year thereafter based upon any cost-of-living increase during the preceding year. By adoption of this new fluctuating factor in the computation of retirement allowances tied to cost of living rather than to current legislative salaries, the Legislature apparently sought to accomplish in a different way the LRL's objective of maintaining the purchasing power of retirement benefits. The original plan to achieve that objective—connecting retirement allowances to current legislative salaries—had proven ineffective because those salaries were not increased periodically to reflect inflated living costs from 1954 to 1964, when section 9360.9 became effective.

In 1966, as a result of an extensive partial revision of the California Constitution, annual regular legislative sessions were introduced and state legislators were authorized for the first time to set their own salaries. (See Cal. Const., art IV, §§ 3, 4.) The former provision for a salary of $500 per month (see *id.*, former art. IV, § 2, subd. (b)) was repealed and a 1966 statute establishing a salary of $16,000 per annum commencing January 2, 1967, was ratified. (See *id.*, former art. XXII, § 6, as adopted Nov. 8, 1966; § 8901.) Included in article IV, section 4 was a provision prohibiting the Legislature from utilizing the new, substantially increased legislative salary as a basis for computing the retirement benefits of any legislator who retired before 1967 and therefore had not in fact received the new salary during his or her incumbency. The pensions of legislators whose salaries had not exceeded $500 per month were to continue

to be computed on the basis of that salary. Contemporaneously, the Legislature added section 9359.11 to the LRL, effective January 2, 1967. That section expressly provides that notwithstanding any contrary provision of section 9359.1—tying retirement allowances to current legislators' salaries—the retirement benefit of any legislator retiring before 1967 shall be based upon the $500 monthly salary.

Pursuant to these provisions, the Board consistently has computed the retirement allowances of respondents on the basis of the $500 monthly salaries which they had received as legislators, adjusted for the cost-of-living increases provided by section 9360.9. In December 1978, however, apparently in response to our decision in *Betts* v. *Board of Administration* (1978) 21 Cal.3d 859 [148 Cal.Rptr. 158, 582 P.2d 614], respondents applied to the Board to recalculate their retirement allowances free of the restrictions imposed by section 9359.11, and article IV, section 4 of our Constitution. The Board rejected the application.

[34 Cal.3d 119]

Respondents then sued for mandate to compel the Board to grant the relief requested on the ground that application of the foregoing constitutional and statutory limitations to the computation of their retirement benefits impaired their contractual pension rights in violation of the contract clauses of the United States and California Constitutions. (See U.S. Const., art. I, § 10; Cal. Const., art. I, § 9.) The Board, in cross-complaining for declaratory relief, urged the constitutionality of the challenged provisions and the validity of its computations pursuant thereto. As indicated, the trial court accepted respondents' contentions and issued mandate. The Board appeals.

The United States Constitution prohibits any state from passing a law "impairing the obligation of contracts." (U.S.

Const., art. I, § 10.) A parallel proscription is contained in article I, section 9 of the California Constitution. The federal provision has been held to apply to any enactment upon which a state confers the force of law, including its own Constitution. (*Lyon* v. *Flournoy* (1969) 271 Cal.App.2d 774, 779 [76 Cal.Rptr. 869], and cases therein cited.) It follows, accordingly, that even though a state may by constitutional amendment supersede its own constitutional protection for contracts, such modification and any law adopted pursuant thereto still must pass federal constitutional muster. (See *Olson* v. *Cory* (1982) 134 Cal.App.3d 85, 101 [184 Cal.Rptr. 325].)

Not every change in a retirement law constitutes an impairment of the obligations of contracts, however. (See *Stork* v. *State of California* (1976) 62 Cal.App.3d 465, 468 [133 Cal.Rptr. 207].) Nor does every impairment run afoul of the contract clause. The United States Supreme Court has observed, "Although the Contract Clause appears literally to proscribe 'any' impairment, . . . 'the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula.' [Citation.] Thus, a finding that there has been a technical impairment is merely a preliminary step in resolving the more difficult question whether that impairment is permitted under the Constitution." (*United States Trust Co.* v. *New Jersey* (1977) 431 U.S. 1, 21 [52 L.Ed.2d 92, 109, 97 S.Ct. 1505].) An attempt must be made "to reconcile the strictures of the Contract Clause with the 'essential attributes of sovereign power,' . . ." (*Ibid.*) For example, "[m]inimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation." (*Allied Structural Steel Co.* v. *Spannaus* (1978) 438 U.S. 234, 245 [57 L.Ed.2d 727, 737, 98 S.Ct. 2716],

fn. omitted; accord *Valdes* v. *Cory* (1983) 139 Cal.App.3d 773, 789 [189 Cal.Rptr. 212].)

The high court has also expressed the relevant principles another way: "The constitutional prohibition against contract impairment does not exact

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a rigidly literal fulfillment; rather, it demands that contracts be enforced according to their 'just and reasonable purport'; not only is the existing law read into contracts in order to fix their obligations, but the reservation of the essential attributes of continuing governmental power is also read into contracts as a postulate of the legal order. (*City of El Paso* v. *Simmons* (1965) 379 U.S. 497, 508 . . .; *Home Building & Loan Assn.* v. *Blaisdell* [1934] 290 U.S. [398,] 428-429, 434-435 . . . .) The contract clause and the principle of continuing governmental power are construed in harmony; although not permitting a construction which permits contract repudiation or destruction, the impairment provision does not prevent laws which restrict a party to the gains 'reasonably to be expected from the contract.' (*City of El Paso* v. *Simmons, supra,* 379 U.S. at p. 515 . . . .) Constitutional decisions 'have never given a law which imposes unforeseen advantages or burdens on a contracting party constitutional immunity against change.' (*Ibid*; see 70 Dick. L.Rev. 524-534 (1966); 56 Colum. L.Rev. 251-270 (1956).)" (*Lyon* v. *Flournoy, supra,* 271 Cal.App.2d at p. 782; accord *Coast Bank* v. *Holmes* (1971) 19 Cal.App.3d 581, 596 [97 Cal.Rptr. 30].)

The application of these principles to the modification of rights arising under the retirement laws of this state has been well established. Thus, "A public employee's pension constitutes an element of compensation, and a vested contractual right to pension benefits accrues upon acceptance of

employment. Such a pension right may not be destroyed, once vested, without impairing a contractual obligation of the employing entity. [Citation omitted.]" (*Betts* v. *Board of Administration, supra*, 21 Cal.3d 859, 863; see *Kern* v. *City of Long Beach* (1947) 29 Cal.2d 848, 853 [179 P.2d 799].)

A constitutional bar against the destruction of such vested contractual pension rights, however, does not absolutely prohibit their modification. With respect to active employees, we have held that any modification of vested pension rights must be reasonable, must bear a material relation to the theory and successful operation of a pension system, and, when resulting in disadvantage to employees, must be accompanied by comparable new advantages. (*Allen* v. *City of Long Beach* (1955) 45 Cal.2d 128, 131 [287 P.2d 765], and cases cited; *Abbott* v. *City of Los Angeles* (1958) 50 Cal.2d 438, 449 [326 P.2d 484]; *Lyon, supra*, 271 Cal.App.2d at p. 782.) As to retired employees, the scope of continuing governmental power may be more restricted, the retiree being entitled to the fulfillment of the contract which he already has performed without detrimental modification. (*Lyon, supra*, at p. 783.) "Nevertheless, even here, it is necessary to perceive the terms of the contract and to utilize those terms to measure the claimed impairment." (*Ibid.*)

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The constitutional and statutory provisions which delineate the contract before us already have received careful appellate construction. In *Lyon*, the operative facts closely paralleled those in the present matter. Lyon was a legislator who had retired in 1955, at a time when a legislator's salary was constitutionally fixed at $500 per month. Like the retirement benefits of respondents here, therefore, Lyon's

benefit theoretically would fluctuate with periodic adjustments in the salaries of incumbent legislators, in accordance with section 9359.1, subdivision (a). As already noted, however, the prospective advantage of that statute remained theoretical for all retired legislators during that period because salaries remained at the $500 per month level until 1967. Further, although Lyon had retired and, in fact, had died before the Legislature's adoption of the direct cost-of-living adjustment provision of section 9360.9 in 1963, his widow's retirement allowance nonetheless was increased in accordance with that cost-of-living formula, as were the retirement allowances of legislators like respondents who retired subsequently.

After the constitutional revision of 1966, Lyon's widow sued to have her retirement allowance—fixed at one-half of her husband's allowance—computed on the basis of the new, substantially increased salary of $16,000 per annum, notwithstanding the explicit constitutional prohibition against such procedure. As with respondents here, she claimed that the new provision's attempt to abrogate the fluctuating pension feature of section 9359.1, subdivision (a), with respect to legislators who had received no more than $500 per month impaired her vested pension rights in violation of her husband's contract. The *Lyon* court rejected her claim.

In analyzing the statutes comprising the terms of the contract upon which the claimant relied, the *Lyon* court first observed that the mathematical relationship described in section 9359.1, subdivision (a), between retirement benefits and current legislative salaries was designed to enable "retired employees to maintain a fairly constant standard of living despite fluctuations in living costs." (271 Cal.App.2d at p. 783.) The court then noted the patent failure of the means originally chosen to achieve that objective because of the neglect of the people, by constitutional amendment,

to adjust legislative salaries over a 12-year period, contrary to the implicit assumption on which the mathematical formula had been based. (*Id.*, at pp. 783-785.) In the face of the people's rejection of several proposed constitutional amendments designed to increase those salaries—and, as a consequence, the pensions tied thereto—the Legislature then undertook to extend relief to retirees in a manner which *was* within its power, adding to the LRL the cost-of-living adjustment formula of section 9360.9.

Thus, the Legislature accomplished directly what it no longer realistically could expect to occur as an incident of the original statutory scheme. "In

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the perspective of 1963 the original fluctuation formula [of section 9359.1, subdivision (a)] was now dormant, for there was no prospect that the voters would raise the salaries of active legislators." (*Id.*, at p. 785.)

"Against this background, the 1966 constitutional revision, with its rejection of the proposed $16,000 salary as a factor in the retirement allowance of existing beneficiaries, was framed and adopted. The original law had held out to the covered employees a fluctuation provision whose theory and objective, whatever its literal means, was to sustain the living standard of the system's beneficiaries. This objective was now being met with a substitute formula, which tied the benefit amount to cost indices rather than current salaries. The sharp salary increase to $16,000 was not tied to the creeping progression of cost indices. Neither had it any relevancy to the retirement law's cost-of-living objective. That objective was being met by the substitute formula, and the 1966 restriction in no way obstructed it." (*Lyon, supra*, 271 Cal.App.2d at p. 785.)

Acknowledging that the 1966 exclusion prevented *literal* fulfillment of the 1947 law's provision for a pension geared to current salaries and was thus theoretically "detrimental" when measured solely by the language of the original fluctuation provision, the *Lyon* court emphasized that the constitutional revision had no such actual effect upon either the objective or operation of the retirement law. "As expressed in California decisional law throughout the retirement statute's existence, that objective had been the maintenance of the real purchasing power of the beneficiaries' allowances." (271 Cal.App.2d at p. 787.)

In thus rejecting the claim that Mrs. Lyon's vested contractual rights had been impaired unconstitutionally, the *Lyon* court explained: "The 1966 restriction preserved the basic character of the earned benefit but withheld a windfall unrelated to its real character. In juxtaposition to the legitimate exercise of ongoing governmental powers, the beneficiaries' rights were measured not by 'rigid literal fulfillment' of the contract, but by its 'just and reasonable purport.' (*Home Building & Loan Assn.* v. *Blaisdell, supra*, 290 U.S. at p. 429 . . . .) The law-making power chose to confine beneficiaries to the gains 'reasonably to be expected from the contract' and to withhold 'unforeseen advantages' which had no relation to the real theory and objective of the fluctuation provision. Such a choice is not the repudiation of a debt, not an impairment of the contract. (*City of El Paso* v. *Simmons*, 379 U.S. at p. 515 . . . .)" (271 Cal.App.2d at p. 787.) We agree.

Respondents contend, however, that the foregoing rationale of *Lyon* has been weakened by our subsequent decision in *Betts* v. *Board of Administration, supra*, 21 Cal.3d 859. *Betts* involved an LRS member who served as

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State Treasurer from 1959 to 1967. During that period a retired Treasurer's allowance was computed on the basis of the incumbent Treasurer's salary. (See former § 9359.1, subd. (b).) In 1963, while Betts was still in office, the cost-of-living adjustment formula of section 9360.9—by its terms also applicable to constitutional officers—was added to the LRL. In 1969, after he left government service but before he formally retired, the incumbent's salary was increased. In 1974, and still before Bett's retirement, section 9359.1, subdivision (b), was amended to eliminate the fluctuating basis of a retired executive officer's retirement allowance and to substitute therefor the highest salary that officer actually had received during his own incumbency. Thereafter, Betts retired.

In upholding Betts' subsequent claim that the 1974 amendment could not constitutionally be applied to eliminate the fluctuating feature of his pension, we concluded that under the circumstances of that case "the prior version of section 9359.1 together with section 9360.9, enacted in 1963, form the basis by which petitioner's reasonable pension expectations must be measured." (21 Cal.3d at p. 867.) We rejected the Board's claim in *Betts* that the 1963 addition to the LRL of the cost-of-living adjustment factor of section 9360.9 should be viewed as a "comparable new advantage" to offset the 1974 attempted elimination of the fluctuating factor embodied in former section 9359.1, subdivision (b), reasoning that Betts had served as Treasurer for four years under a statutory scheme which apparently contemplated application of both the fluctuating and cost-of-living factors to his retirement allowance. (*Ibid.*)

The primary basis for our determination that Betts reasonably was entitled to expect the benefit of both the fluctuating and cost-of-living provisions was the absence in his

case of any factors militating against the reasonableness of that expectation such as were present in *Lyon* and are present here. There was no suggestion in *Betts*, for example, that the statutory scheme for pension enhancement of constitutional officers, like Betts, was not operating as originally designed. *Lyon* and the present case, on the other hand, are premised upon the discrepancy between the theoretical objective and the actual operation of the legislators' statutory pension scheme.

Thus, respondents' argument that they, like Betts, served while both the fluctuating provision of section 9359.1, subdivision (a), and the cost-of-living provision of section 9360.9 were "in effect," misses the point. Such a claim misapprehends the true character of the LRL as it actually operated on legislators' retirement benefits during respondents' incumbency. Indeed, in *Betts* we stressed the "historically unique" context in which the *legislative* salary/retirement scheme operated during the period here in question and which gave rise to the constitutional revision of 1966. (21 Cal.3d at

[34 Cal.3d 124]

pp. 865-866.) Distinguishing *Lyon*, we noted that because of those unique circumstances, the retiree there, unlike Betts, "had no 'reasonable expectation' while in office that he would enjoy a *double* cost-of-living formula . . . ." (*Id.*, at p. 866, italics in original.)

In focusing on "*reasonable* pension expectations" in *Betts* (italics added), we implicitly affirmed the well established constitutional principle that "Laws which restrict a party to those gains reasonably to be expected from the contract are not subject to attack under the Contract Clause, notwithstanding that they technically alter an obligation of a contract." (*El Paso* v. *Simmons* (1965) 379 U.S. 497, 515 [13

L.Ed.2d 446, 458, 85 S.Ct. 577].) "The Constitution is 'intended to preserve practical and substantial rights, not to maintain theories.' *Davis* v. *Mills* [1904] 194 U.S. 451, 457." (*Faitoute Co.* v. *Asbury Park* (1942) 316 U.S. 502, 514 [86 L.Ed. 1629, 1637, 62 S.Ct. 1129].) The claimed impairment of respondents' theoretical contractual right to the application of the fluctuating formula of section 9359.1, subdivision (a), to their pensions—a theory which directly conflicts with the actual operation of the LRS during their incumbency—thus derives no support from the contract clause.

Neither do we find persuasive respondents' attempt to distinguish their case from *Lyon* on the ground that Lyon had retired before the addition of the cost-of-living formula of section 9360.9 to the LRL while respondents retired after that enactment. Respondents argue that because the cost-of-living feature was added after Lyon's retirement, he had no reasonable expectation to the benefit of *that* formula. Therefore, they contend, its addition to the LRL in 1963 somehow compensated for the subsequent constitutional elimination of the fluctuating feature in 1966. They note that we referred to that circumstance in *Betts* (see 21 Cal.3d at p. 866), and urge that *Lyon* must be viewed as turning on that factor, which is lacking in the present case.

Here again, however, respondents seek to capitalize on the technical coexistence of the fluctuating and cost-of-living provisions during their incumbency, contrary to the actual operation of the LRS. *Betts*, on the other hand, focused on the *effect* of the contemporaneous statutory provisions on the employee's reasonable pension expectations in the actual circumstances of that case. As we have indicated, the mere existence of section 9359.1, subdivision (a), could not, in view of its practical dormancy, have added anything to respondents' reasonable pension expectations in the con-

text of this case. The essential and critical factor is that neither respondents nor the claimant in *Lyon* reasonably could expect under the terms of their employment contract to obtain retirement allowances computed on the basis of the

[34 Cal.3d 125]

unique salary increase acccomplished by the constitutional revision of 1966 which expressly negated such expectations.

While not examined by the parties, a fiscal consideration provides additional support for rejection of respondents' claim. Respondents were required to contribute 4 percent of their $500 monthly salaries to LRS. (See § 9357.) From its inception, the LRL contemplated periodic state contributions to the LRL from the general fund in such amounts as would equal the estimated difference between accumulated members' contributions and the retirement benefits actually paid each year. (See former § 9358, as adopted in 1947.) In 1977, the state's contribution was fixed by statute at 18.81 percent of the retirement benefits paid during each preceding month (§ 9358); presumably, previous experience had indicated that state contributions in that percentage of benefits paid approximates the difference between income to and outgo from the LRS.

It thus becomes apparent that payment to respondents of inflated retirement allowances, computed on the basis of a $16,000 annual salary which they never had received, not only would give to them a bonanza far outstripping any reasonable expectation for cost-of-living increases—as indicated above—but also would afford them pensions dwarfing their relatively modest contributions to the LRS. (See *Betts, supra,* 21 Cal.3d at p. 866.) This, in turn, would require correspondingly excessive appropriations of general tax funds to maintain the retirement system's fiscal integrity.

In our interpretation of the interplay of sections 9359.1, 9359.11, and 9360.9, every principle of equity and financial responsibility strongly counsels against such a consequence.

Conclusion

By their constitutional revision of 1966, the people of California elected, in part, to redress inequitably low legislative salaries—reflecting the increased duties of annual legislative sessions—while at the same time confining retirement beneficiaries to those gains reasonably to be anticipated from their employment contract. With respect to legislators who retired before the salaries were increased so substantially, that restriction took the form of withholding unforeseen or windfall advantages which bore no relation to the fundamental theory and objective of the LRS, as protected by provision for cost-of-living adjustments. Such action by the people constituted neither the repudiation of any debt nor the unconstitutional impairment of an employment contract. For these reasons, we reverse the trial court's judgment and remand for further proceedings consistent with our opinion.

[34 Cal.3d 126]

Bird, C. J., Kaus, J., Reynoso, J., Grodin, J., Stone, J.,* and Thompson, J.,* concurred.

Appendix

(Excerpt from California Constitution
Article IV, Section 4)

"....

"The Legislature may not provide retirement benefits based on any portion of a monthly salary in excess of 500

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*Assigned by the Chairperson of the Judicial Council.

dollars paid to any member of the Legislature unless the member receives the greater amount while serving as a member in the Legislature. . . ."

(Excerpts from Government Code)

§ 9359.1. Retirement allowance; amount

"(a) The retirement allowance for a member all of whose credited service was rendered as a Member of the Senate or Assembly except as provided in subdivision (d) is an annual amount equal to five percent (5%) of the compensation payable, at the time payments of the allowance fall due, to incumbent Members of the Senate or Assembly, multiplied by the number of years of service with which the member is entitled to be credited at the time of his retirement not to exceed fifteen (15) years. In no event shall any retirement allowance payable under this chapter to any such member exceed the compensation payable to Members of the Legislature at the time the payment of the allowance is made, except that the retirement allowance of any such member who serves more than 15 years shall be increased by an amount equal to 3 percent of the compensation payable, at the time payment of the allowance falls due, to incumbent Members of the Senate or Assembly for each year or fraction of a year in excess of 15 years.

"(b) The retirement allowance for a member all of whose credited service was rendered as an elective officer of the state whose office is provided for by the Constitution other than a judge (and other than a Member of the Senate or Assembly) the sum of (1) is an annual amount equal to five percent (5%) of the highest compensation received by the officer while serving in such office, multiplied by the number of years of service with which the member is entitled to be credited at the time of his retirement, not to exceed eight (8) years, plus, if the member is credited with 24 or

more years of service, (2) one and two-thirds percent (1⅔%) of the compensation to which the five percent (5%) rate is applicable under subparagraph (1) of this subdivision for his first eight years of credited service, multiplied by the number of years of service in excess of eight years with which the member is entitled to be credited at the time of his retirement, not to exceed 12 years of such credited service in excess of the eight years of service referred to in subparagraph (1) of this subdivision.

"....."

§ 9359.11. Service ending prior to term commencing in 1967; salary for application of formula

"Any contrary provisions of Section 9359.1 notwithstanding, in computing the retirement allowance of a legislator member of the Legislators' Retirement System whose service as a

[34 Cal.3d 127]

legislator ended prior to the term commencing in 1967, the salary to which the applicable formula shall be applied shall be five hundred dollars ($500) per month, and any increase in salary of legislators above such amount shall be disregarded for such purpose."

§ 9360.9. Cost of living adjustments

"Notwithstanding any other provisions of this chapter, the provisions of this section shall be applicable to all allowances granted by this chapter commencing with each installment paid or payable on or after January 1, 1964, with respect to Members of the Senate or the Assembly not having service in such office during or after the term commencing in 1967 and members who are elective officers of the state whose offices are provided by the Constitution and who were first elected to any such office prior to January 1, 1966.

"On or before January 1, 1964, the board shall adjust the amount of the allowances payable during the 1964 calendar year to reflect any increase in cost of living occurring between the 1963 calendar year and the 1955 calendar year, inclusive, and any increase resulting from such adjustment shall be payable commencing with each installment of allowances paid or payable on or after January 1, 1964. On or before January 15, 1965, and, on or before January 15 of each year thereafter, the amount of the allowances provided by this chapter shall be adjusted by the board to reflect any increase in cost of living occurring after January 1 of the immediately preceding calendar year. Effective January 1, 1978, the average of the separate indices of the 'Consumer Price Index for All Urban Customers' for the Los Angeles-Long Beach-Anaheim area and the San Francisco-Oakland area, as published by the United States Bureau of Labor Statistics, shall be used as the basis for determining the changes in the cost of living. For the period prior to January 1, 1978, the average of the separate indices for the Los Angeles-Long Beach area and the San Francisco-Oakland area, as published by the United States Bureau of Labor Statistics, shall be used as the basis for determining the changes in the cost of living. The cost-of-living increase shall equal or exceed 1 percent before any adjustment is made in the allowance. The calendar year 1954 shall be used as the base year in computing any annual adjustment. The annual adjustment made on or before January 15, 1965 and made on or before January 15 of each calendar year thereafter shall correspond to the average annual change in the calendar year immediately preceding the year during which the adjustment shall be effective. The adjustment made on or before January 1, 1964, shall correspond to the total of the average annual changes in each calendar year

from the 1955 calendar year to the 1963 calendar year, inclusive.

"The adjustment provided by this section shall be made only if it operates to effect an increase over the allowance payable for the calendar year immediately preceding."

## APPENDIX B.

### Order Denying Rehearing.

L.A. No. 31702

In the Supreme Court of the State of California in Bank.

Allen, Sr. et al. v. Board of Administration of the Public Retirement System.

Filed: September 7, 1983.

Respondents' petition for rehearing DENIED.

/s/ Bird
*Chief Justice*

## APPENDIX C.

### Opinion of the California Court of Appeal.

Court of Appeal of the State of California, Second Appellate District, Division Three.

Don A. Allen, Sr., Stanley Arnold, Hale H. Ashcraft, John C. Begovich, Ruth Casey, Clayton A. Dills, Frances Thelma Donnelly, Peggy P. Donovan, F. Douglas Ferrell, Myron H. Frew, Mary C. Gaffney, Charles B. Garrigus, Luther E. Gibson, Burt Henson, Ruth Holmes, Paul J. Lunardi, Stanley Pittman, Thomas M. Rees, Edwin J. Regan, W. Byron Rumford, Sr., Harold T. Sedgwick, Philip Soto, William F. Stanton, Vernon Sturgeon, William Symons, Jr., Howard J. Thelin, Jerome R. Waldie, Robert D. Williams, John C. Williamson, George A. Willson, Gordon H. Winton, Jr., and Pearce Young, Petitioners and Respondents, v. Board of Administration of the Public Employees' Retirement System, Appellant. 2d Civil No. 62827 (Super. Ct. No. C 313948).

Filed: November 22, 1982.

APPEAL from a judgment of the Los Angeles Superior Court granting peremptory writ of mandate and declaratory judgment. Vernon G. Foster, Judge. Affirmed.

Stroock & Stroock & Lavan; William H. Levit, and Margaret A. Nagle, for Petitioners and Respondents.

Charles I. Gibbs, Gerald R. Adams, and Donald M. Pach, for Appellant.

*Summary*

Respondents, legislators who retired from office prior to the 1967 term or their surviving spouses, sought a writ of mandate directing appellant Board of Administration ("Board") of the Public Employees' Retirement System to compute their retirement allowances in accordance with

Government Code sections 9359.1, subdivision (a), and 9360.9[1] without giving effect to section 9359.11 and article IV, section 4 of the California Constitution.

For the reasons stated herein, we conclude that our Supreme Court's decision in *Betts* v. *Board of Administration* (1978) 21 Cal.3d 859 is binding on the case at bench. Under the doctrine of stare decisis (*Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal.2d 450, 457), we have no alternative but to follow *Betts, supra,* and conclude that respondents had a contractual pension expectation to be paid a retirement allowance computed on a cumulative basis using both the fluctuating salary formula set forth in section 9359.1, subd. (a) and the cost of living formula set forth in section 9360.9. Accordingly, we affirm the trial court's judgment granting the writ of mandate and declaratory relief.

*Statement of Facts and Proceedings Below*

Respondents are 32 former and retired legislators or surviving spouses of former legislators[2] who comprise all or substantially all of a group of former and retired legislators who (a) served in the Legislature during the 1963-1965 terms commencing January 1, 1963 (many of whom also served during terms prior to the 1963 term), (b) left office and

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[1]Hereinafter all references shall be to the Government Code unless otherwise indicated.

[2]According to respondents' brief, respondents' class is limited to those few persons (or their deceased spouses) who served in the Legislature while both the fluctuating formula set forth in section 9359.1, subdivision (a) (originally enacted in 1949), and the cost of living formula set forth in section 9360.9 (originally enacted in 1963) were in effect. (These formulas will be discussed further *infra.*) At oral argument, respondents represented that this class is limited to these approximately 32 persons and will not increase in number by more than a few persons by reason of a ruling in their favor.

For convenience, we will refer to respondents in this opinion as the former legislators although some of these persons are now deceased and their surviving spouses have acquired benefits under LRS.

retired prior to the commencement of the 1967 term which began on January 1, 1967, and (c) are members of the Legislators' Retirement System ("LRS").

Pursuant to section 9353, the appellant Board is the statutory administrator of LRS.

During respondents' incumbency in the Legislature, the retirement allowance available to retired members of LRS was governed by section 9359.1, subdivision (a), of the Legislators' Retirement Law ("LRL") (§§ 9350, et seq.). This section provided (and still provides) in pertinent part as follows: "The retirement allowance . . . [for a legislative member] . . . is an annual amount equal to five percent (5%) of the compensation payable, at the time payments of the allowance fall due, *to incumbent Members of the Senate or Assembly*, multiplied by . . . [years of service not to exceed fifteen years]. . . ." (Emphasis added.) Amendments to this section in 1961 and 1963 increased the retirement allowance by adding the additional sum of 2 percent and then 3 percent of the compensation payable for years of service in excess of 15 years.

Under the "fluctuating" formula set forth in section 9359.1, subdivision (a), a retired legislator's monthly allowance would be adjusted periodically to reflect changes in the salary payable to current incumbent members of the Legislature.

In 1963, during respondents' incumbency, the Legislature added section 9360.9 to LRL, which provides for automatic annual adjustment of retirement allowances in accordance with a formula designed to reflect upward changes in the cost of living.

At the November 8, 1966, general election, California voters ratified an extensive partial revision of the State Constitution which appeared on the ballot as Proposition 1-A.

In accordance with Proposition 1-A, article IV, section 4, of the California Constitution became effective on January 1, 1967, a date subsequent to respondents' retirements. For purposes of computing the retirement allowances of legislators who had retired prior to the commencement of the 1967 term, the amendment purports to limit the salary on which the allowances are based to $500.00 per month. Also effective January 1, 1967, the Legislature added section 9359.11 to the LRL in anticipation of the aforesaid constitutional revision. Section 9359.11 had the same effect as the above constitutional revision and provides as follows:

> "Any contrary provisions of Section 9359.1 notwithstanding, in computing the retirement allowance of a legislator member of the Legislators' Retirement System whose service as a legislator ended prior to the term commencing in 1967, the salary to which the applicable formula shall be applied shall be five hundred dollars ($500) per month, and any increase in salary of legislators above such amount shall be disregarded for such purpose."

The effect of article IV, section 4, and section 9359.11, if applicable to respondents, is to substitute a "fixed" system of computation of the retirement allowance frozen at a salary of $500 per month in place of the prior "fluctuating" system set forth in section 9359.1, subdivision (a). Appellant Board has and continues to calculate respondents' retirement allowances pursuant to article IV, section 4, and section 9359.11, basing their allowances on a fixed monthly salary of $500.00 rather than applying the fluctuating formula reflecting the salary payable to current incumbent legislators, as provided by section 9359.1, subdivision (a).

In 1978, respondents filed claims with the Board and with the State Board of Control seeking recalculation of their retirement allowances in accordance with both the fluc-

tuating and cost of living formulae set forth in sections 9359.1, subdivision (a), and 9360.9, respectively, and without giving effect to section 9359.11 and article IV, section 4. The State Board of Control rejected respondents' claims. Subsequently, respondents were afforded an Administrative Hearing pursuant to the Administrative Procedure Act (§ 11370 et seq.). Despite the Board's contention to the contrary, the administrative law judge ruled that the Board has jurisdiction to recalculate respondents' retirement allowances and issued an interlocutory order on jurisdiction. The Board later vacated the order of the administrative law judge and issued an Order on Jurisdiction ruling that the Board "lacks jurisdiction and authority to grant the application of Respondents to recalculate their retirement allowances."

Subsequently, respondents petitioned the court below for a writ of mandate. Appellant cross-complained for a declaratory relief seeking a decree that article IV, section 4 of the state's Constitution and section 9359.11 are constitutional and that respondents' retirement allowances must be computed in accordance with these provisions.

The trial court granted judgment in favor of respondents and ordered the requested writ of mandate and declared that article IV, section 4 and section 9359.11 could not be constitutionally applied to respondents. Appellant appeals from the entry of said judgment.

*Appellant's Contentions on Appeal*

Appellant's contentions on appeal can be summarized as follows:

1. Mandamus under either Code of Civil Procedure section 1094.5 or 1085 is an inappropriate remedy in the instant case.

2. The case at bench is *sui generis* and therefore *Betts* v. *Board of Administration* has no application.

3. Respondents did not have a reasonable expectation of receiving multiple cost-of-living retirement allowances. Instead, respondents' expectations were to receive a retirement allowance as provided by the 1966 amendments to the law.

*Discussion*

*The Trial Court Properly Granted Mandamus*

The Board contends that under article III, section 3.5, subdivision (a), of the state Constitution, it has no power, as an administrative agency, "[t]o declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional. . . ." Instead, the Board concedes that declaratory relief is an appropriate remedy.

While article III, section 3.5, subdivision (a), prohibits a state agency from declaring a statute unconstitutional, this provision is inapplicable to the facts in the instant case. Respondents do not claim, and there is no necessity to determine, that either section 9359.11 or article IV, section 4, is unconstitutional. Rather, the judgment provides that, because respondents' rights to the fluctuating and cost of living formulae were earned and vested prior to the enactment of these sections, they may not be constitutionally applied to them.[3]

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[3]The administrative law judge ruled that "[t]he resolution of issues posed do not necessarily require the determination of [the] constitutionality of any provision. The entire legal resolution may rest upon the *application* of the raised provisions and *not their constitutionality*. In effect Article III, Section 3.5 of the California Constitution does not prevent a State administrative body from determining that a particular amendment to a pension system may not be applied to a particular participant because such application would be unconstitutional. (See *Yick Wo* v. *Hopkins* (1886) 118 U.S. 356 . . . .)"

Appellant's contention is simply without merit. Code of Civil Procedure section 1085 provides for mandamus "to compel the performance of an act which the law enjoins, or a duty resulting from an office, trust, or station. . . ." Respondents correctly assert that they may test whether the *Betts* decision applies to them by way of mandamus. In *Betts, supra,* and *Lyon* v. *Flournoy* (1969) 271 Cal.App.2d 774, under almost identical procedural situations, mandamus was held to lie.

*Betts v. Board of Administration Is Applicable to the Instant Case and Determines Respondents' Contractual Pension Expectations*

Bert A. Betts served as Treasurer of the State of California from 1959 to 1967, and, as an elected state constitutional officer, was a member of LRS pursuant to section 9355.4. During Betts' incumbency, the retirement allowance for state constitutional officers was set forth in section 9359.1, subdivision (b). This provision was similar to the provision for legislators set forth in section 9359.1, subdivision (a), which was a "fluctuating" amount, computed by multiplying 5 percent of the salary of the present incumbent holding the office which the pensioner last held prior to retirement, times the pensioner's number of years of service. In 1963, the Legislature added section 9360.9 to provide for an automatic annual increase of pensions in accordance with the increase in cost of living. Thus, from January 1964 until Betts left office January 1967, both the "fluctuating" salary formula and the cost of living formula were in effect, providing two simultaneously applicable formulae for computing the amount of pensions payable under LRL.

In 1974, after Betts left office but before his retirement in 1976, the Legislature amended section 9359.1, subdivision (b), to change the method of computing pensions for

elected constitutional officers. Pursuant to the amended section 9359.1, subdivision (b), a "fixed" salary formula was substituted in place of the prior "fluctuating" salary formula. Thus, the retirement allowance became an annual amount equal to 5 percent of the highest compensation actually received by the retired officer during his term of office (rather than that received by the present incumbent office holder), multiplied by the pensioner's number of years of service. The highest salary received by Betts as Treasurer was $21,499; in 1969, the Treasurer's salary was increased to $35,000.

In 1976, Betts retired because of disability and applied for his pension. The Board ruled that Betts' pension should be computed under the 1974 amendment on the basis of Betts' highest salary in office, $21,499, rather than under the then current salary of $35,000. Betts petitioned for a writ of mandate directing the Board to compute his retirement allowance on the basis of the $35,000 salary payable to the then incumbent State Treasurer.

Our Supreme Court concluded in *Betts* that the 1974 amendment substituting the "fixed" formula for the "fluctuating" formula could not constitutionally be applied to Betts "because the amendment withdraws benefits to which he earned a vested contractual right while employed." (*Betts* v. *Board of Administration, supra*, 21 Cal.3d at p. 867.) In so holding, our Supreme Court stated:

> "A long line of California decisions has settled the principles applicable to the problems herein presented. A public employee's pension constitutes an element of compensation, and a vested contractual right to pension benefits accrues upon acceptance of employment. Such a pension right may not be destroyed, once vested, without impairing a contractual obligation of the employing public entity. . . ." (*Id.*, at p. 863.)

"The Board [appellant herein] urges that 1963 amendments to the pension plan provide the necessary offsetting advantage in this case. In that year, the Legislature added section 9360.9, which requires automatic annual adjustment of pension benefits to reflect upward changes in the cost of living. Each January 1, under this statute, the previous year's benefit is multiplied by that year's average increase in the Bureau of Labor Statistics cost-of-living indices for San Francisco and Los Angeles, respectively, using 1954 as the base year. The product of this calculation becomes the basis of the benefit payable for the ensuing year.

"Thus, the Board argues, one 'cost of living' formula was simply replaced by another; petitioner, it urges, had no reasonable expectation when he left office that he would enjoy the 'double windfall' of the cost-of-living index formula provided by section 9360.9 *plus* the 'fluctuating' benefit adjustment, the increasing salary scale, mandated by the pre-1974 version of section 9359.1. Under the circumstances of this case, the Board's contention cannot be sustained.

"In asserting that termination of the 'fluctuating' system was reasonable here, the Board relies heavily on *Lyon* v. *Flournoy* (1969) 271 Cal.App.2d 744. . . ."[4]

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[4]In *Lyon* v. *Flournoy*, *supra*, 271 Cal.App.2d 774, the petitioner's decedent had retired from the Legislature in 1955 and commenced drawing a monthly retirement allowance. At the time of the decedent Lyon's retirement and for more than ten years thereafter, the salary for members of the Legislature was only $500 per month. Lyon's retirement allowance and his widow's allowance following his death was computed on the basis of this salary. Repeated attempts to liberalize salaries of the legislators by constitutional amendment were rejected by the voters until 1966 when Proposition 1-A was passed (which authorized the Legislature to set its own salaries and validated a statute fixing salaries at $16,000 per year, beginning January 1, 1967).

Lyon's widow contended that her husband had earned a "vested right" to computation of benefit, on the basis of the salary provided by Proposition 1-A. The Third District Court of Appeal rejected this claim, observing that Lyon's widow had already been compensated for the hardship caused by a 12-year salary freeze by the 1963 enactment

(footnote continued on following page)

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". . . In contrast to *Lyon*, in the instant case, the 1963 enactment of section 9360.9 occurred *during* petitioner's term as Treasurer, which ran from 1959 to 1967; the 'fluctuating' system of benefit computation was also in effect during this entire period. An employee's contractual pension expectations are measured by benefits which are in effect not only when employment commences, but which are thereafter conferred during the employee's subsequent tenure.

". . . we conclude that the prior version of section 9359.1 together with section 9360.9, enacted in 1963, form the basis by which petitioner's reasonable pension expectations must be measured. For four years, petitioner provided his services under a statutory scheme which *simultaneously* included both computation methods. . . .

"We fully recognize that the effect of our holding is that petitioner thereby receives the benefit of a *double* increment of increase, a troubling result. We can only observe that the Legislature must have intended to provide such benefits to constitutional officers serving between 1963 and 1974 because it left in effect both of the formulae during that 11-year period.

"We therefore conclude that the 1974 amendment to section 9359.1 cannot constitutionally be applied to

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of section 9360.9 which established a cost of living adjustment in the allowance. The Court of Appeal concluded that Lyon had no 'reasonable expectation' that while in office he would enjoy a double cost of living formula.

In *Betts, supra*, our Supreme Court stated that the *Lyon* case was an "unusual fact situation which was historically unique." (21 Cal.3d 865). The *Betts* decision further states that "[i]n *Lyon*, . . . *after the members retirement*, the cost-of-living formula in effect during his active service was replaced by another. The Court of Appeal was therefore entirely correct in saying that the decedent had earned no contractual expectation *while in office* that he would receive the benefits of *both* systems [9359.1(a) and 9360.9]." (Emphasis in original.)

> petitioner, because the amendment withdraws benefits to which he earned a vested contractual right while employed. No 'comparable new advantages' to petitioner appear in the plan which can offset the detriment he has suffered by replacement of a 'fluctuating' system of benefit computation with a 'fixed' system. Petitioner is therefore entitled to have his basic retirement allowance computed on the basis of section 9359.1 as it read when he left office in 1967." (*Betts, supra*, 21 Cal.3d at pp. 865-868.)

Like Betts, respondents served in the Legislature during the period when both the "fluctuating" formula provided by section 9359.1, subdivision (a), and the cost of living formula provided by section 9360.9 were simultaneously in force. Thus, "the 1963 enactment of section 9360.9 cannot be deemed a 'comparable new advantage'[5] offsetting the detriment represented by" the *subsequently* enacted article IV, section 4 of the California Constitution and section 9359.11.

Each of the respondents retired on a date prior to January 1, 1967, the effective date of article IV, section 4, and section 9359.11. If these 1966 provisions are applicable to respondents, they would impose a detriment on respondents by withdrawing benefits — that is, the advantage conferred by a "fluctuating" system — to which they had earned vested contractual rights during their service in office.

Such rights were vested, matured pension rights, and were protected by the Contract Clauses of the United States and California Constitutions and could not be divested or impaired by the subsequent enactment of a state constitutional

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[5]On the necessity of changes in a pension plan which result in disadvantages to employees which must be accompanied by comparable new advantages, see *Allen* v. *City of Long Beach* (1955) 45 Cal.2d 128, 131.

amendment or legislative enactment. (See *Olson* v. *Cory* (1982) 134 Cal.App.3d 85, 96-97; *Frank* v. *Board of Administration, supra,* 56 Cal.App.3d 236, 242; *Lyon* v. *Flournoy, supra,* 271 Cal.App.2d at p. 782.)

*Respondents' Participation in the Legislative Process Is Irrelevant and Does Not Bar Their Action Herein*

Appellant's contention that some of the respondents who themselves had the power to create or modify their own pension rights should not be allowed to contest their own votes by court action. Appellant makes this contention without citing any authority for this proposition, and thereby attempts to distinguish the instant case from *Betts*. We cannot agree with appellant's contention.

At the time each of the respondents retired on or before December 31, 1966, the LRL provided for a "fluctuating" formula for computing their retirement allowances and for an automatic annual adjustment of retirement allowances in accordance with a formula designed to reflect changes in the cost of living.

Appellant points to the fact that 28 of the respondents voted in 1963 for the cost of living increases set forth in section 9360.9 and that 18 of the respondents voted in favor of placing Prosposition 1-A on the November 8, 1966 ballot. Appellant then argues that "[a] legislative majority, which modifies the terms of its own employment contract with the public, should not be heard . . . to complain they were impairing their own contracts." However, appellant does not suggest what should be done about those respondents who voted against such measures or those who did not vote at all.

In essence, appellant argues that because of respondents' participation in the legislative process leading up to the enactments mentioned above, "[i]t is *absurd* to say that by

any objective standards, [respondents had] a 'reasonable expectation' . . . to expect . . . to obtain multiple cost-of-living adjustments." Although appellant argues that an "objective standard" applies, it impliedly suggests that respondents' pension rights depend on a subjective test focused on each of the respondent's voting record. Appellant would at least deprive those respondents of the fluctuating formula provided in section 9359.1 if they voted in favor of placing Proposition 1-A on the ballot or in favor of enacting section 9359.11.

Appellant's contention is without merit. It is a well established rule that vested pension rights, including contractual pension expectations, cannot depend on a subjective standard but must be measured by an objective standard and that such rule applies to all employees similarly situated. *Betts* makes it clear that an individual's "contractual pension expectations" do not turn upon his or her subjective beliefs, but rather "[a]n employee's contractual pension expectations are measured by benefits which are in effect . . . when employment commences, . . . [and] which are thereafter conferred during the employee's subsequent tenure." *Betts, supra*, 21 Cal.3d at p. 866. *Lyon* v. *Flournoy, supra*, 271 Cal.App.2d 774, 779, 782, makes it clear that all public employees, including legislators, are entitled to have their vested pension rights protected by the Contract Clause of the Federal Constitution.

Furthermore, none of the respondents served in the legislature after December 31, 1966. Thus, none of the respondents obtained a significant, if not the major, compensation benefit provided to legislators by Proposition 1-A, namely, a salary increase to $16,000 per year. In effect, it could be argued that the legislators who continued in office after 1966 sought to gain voter approval for their salary increases after 1966 and the ability to make annual adjustments in salary,

subject to certain limitations, at the expense of the respondents who were retiring by representing to the voters that respondents' retirement would be based on a fixed salary of $6,000 per year as adjusted by the cost of living formula set forth in section 9360.9. Viewing the respondents' position in this light, we cannot say that their position is any different from former Treasurer Betts'.

*Disposition*

We are deeply disturbed by our decision that *Betts* is determinative of this appeal insofar as it requires *cumulative* application of both the fluctuating salary formula set forth in section 9359.1, subdivision (a), and of the cost of living formula set forth in section 9360.9. But *Betts* so holds; it states in this respect that there shall be "a double increment of increase."

The doctrine of stare decisis compels us to follow our Supreme Court's decision in *Betts* regardless of our desire to do so. The rule of stare decisis is absolute and there are no exceptions. (*Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal.2d 450, 455.) Nevertheless, we feel compelled to indicate our concern that the application of the *Betts* decision to the present appeal would lead not only to a "troubling results" but a result which we cannot conceive of having been within the contemplation of the Legislature at the time it enacted the above mentioned statutes.

*Betts* holds that the former Treasurer was entitled to a cost of living adjustment applied to a fluctuating base allowance equal to a percentage of the current incumbent's salary — *a double and cumulative escalation*.[6] We recognize

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[6]According to appellant, Betts' retirement allowance for the year 1982 is $59,976 which is computed as follows: 8 years of service at 5 percent per year times the current incumbent's State Treasurer's salary (8 × 5% × $42,400) equals a $17,000 base allowance. This base allowance is augmented by the *additional sum* of that base allowance times the cost of living adjustment set forth in section 9360.9, or $17,000 × 252.8% (1982 cost of living factor) which equals $42,976, slightly more than the incumbent's salary.

This allowance is roughly twice Betts' highest annual salary while in office of $21,499.

that *Betts*, *supra*, 21 Cal.3d at page 867, concludes "that the Legislature must have intended to provide such benefits." However, we are of a contrary view that it is more likely that the Legislature did not intend such a result. Simply stated, it seems that the Legislature would have intended that the cost of living adjustment apply only to Betts' salary while in office (a single escalator) and not be added to and applied also to the future salary of an incumbent office holder (a double and cumulative escalator).[7] The result of the cumulative escalation is a retirement allowance which bears no reasonable relationship to the increase in the cost of living, and therefore cannot legitimately be characterized as a cost-of-living increase.[8]

The effect of applying *Betts* to the instant appeal is to grant respondents a retirement allowance which far exceeds their salaries as former part-time legislators and which may approach and, in some instances, exceed three times the current incumbent legislator's salary.

*Betts* holds that this is the required result because such were his contractual expectations. But, the contractual pen-

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[7]Admittedly, the salary of the current incumbent must be increasing and not decreasing for this double and cumulative escalation to occur. However, this is certainly a reasonable assumption in view of the almost unbroken line of inflation since the Great Depression some 50 years ago.

[8]For example, assuming that one of the respondent's service as a legislator was 20 years, then the 1982 retirement allowance would be computed pursuant to *Betts* as follows: 15 years × 5% per year × $28,110.50 (current incumbent's salary) or $21,082.88 plus 5 years × 3% per year × $28,110.50 or $4,216.57 = $25,299.45, the base allowance under section 9359.1, subdivision (a), or the fluctuating salary. This sum of $25,299.45 is augmented by the cost of living adjustment which is computed by applying thereto the 1982 cost of living factor under section 9360.9 or 252.8% ($25,299.45 × 252.8%) or $63,957.01. The retirement allowance would be the total of these two figures or *$89,256.46* ($25,299.45 plus $63,957.01)!

We have learned that respondent Allen's service in the Legislature was 21 years and so his allowance would be even greater than calculated above.

sion expectations of Betts might well have been to receive the benefits of both the fluctuating salary formula and the cost of living formula but absent the cumulative effect by adding them together. It seems to us that Betts' contractual pension expectations would have been fulfilled if he were simply paid the higher of (1) 40 percent of the current incumbent's salary, or (2) 40 percent of his highest salary while in office enhanced by the cost of living formula set forth in section 9360.9.[9]

But, as stated above, we are compelled by *Auto Equity Sales, Inc.* to apply the *Betts* decision to this appeal. Accordingly, we affirm the judgment entered below.

*CERTIFIED FOR PUBLICATION*

LUI, J.

We concur:

KLEIN, P.J.

POTTER, J.

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[9]Applying this rationale to a hypothetical legislator with 20 years of service, prior to 1967, the retirement allowance would be the *higher* of the two amounts computed below:

(1) 15 years × 5% × $28,110.50 (current incumbent's salary) or $21,082.88 plus 5 years × 3% × $28,110.50 or $4,216.57 = $25,299.45

(2) 15 years × 5% × $6,000 (highest annual salary while in office) or $4,500 plus 5 years × 3% × $6,000 or $900 = $5,400 base allowance. $5,400 plus $5,400 × 252.8% or $13,651.20 = $19,051.20

## APPENDIX D.

### Notice of Appeal to the Supreme Court of the United States.

In the Supreme Court of the State of California.

Don A. Allen, Sr., et al., Appellants, vs. Board of Administration of the Public Employees' Retirement System, Appellee. No. L.A. 31702. (Super. Ct. No. C 313948).

Filed: December 1, 1983.

Notice is hereby given that Don Allen, Sr., et al., the appellants above named, hereby appeal to the Supreme Court of the United States from the judgment of this Court, entered July 11, 1983, reversing the judgment of the Los Angeles Superior Court and vacating the writ of mandamus directed to appellee Board of Administration of the Public Employees' Retirement System. This Court's order denying appellants' Petition for Rehearing was entered on September 7, 1983.

This appeal is taken pursuant to 28 U.S.C. §1257(b).

Dated: December 1, 1983

STROOCK & STROOCK & LAVAN
WILLIAM H. LEVIT
HENRY J. SILBERBERG
MARGARET A. NAGLE
By /s/ William H. Levit
William H. Levit
Counsel for Appellants

## APPENDIX E.

### Relevant Constitutional and Statutory Provisions.

Article I, Section 10 of the United States Constitution provides that:

> No State shall enter into any Treaty, Alliance, or Confederation; grant letters of Marque and Reprisal; coin money; emit Bills of Credit; make any thing but gold and silver coin a tender in payment of debts; pass any Bill of Attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

Article IV, Section 4 of the California Constitution, as enacted in 1966, effective January 1, 1967, provided:

> Compensation of members of the Legislature, and reimbursement for travel and living expenses in connection with their official duties, shall be prescribed by statute passed by rollcall vote entered in the journal, two thirds of the membership of each house concurring. Commencing with 1967, in any statute enacted making an adjustment of the annual compensation of a member of the Legislature the adjustment may not exceed an amount equal to 5 percent for each calendar year following the operative date of the last adjustment, of the salary in effect when the statute is enacted. Any adjustment in the compensation may not apply until the commencement of the regular session commencing after the next general election following enactment of the statute.
>
> Members of the Legislature shall receive 5 cents per mile for traveling to and from their homes in order to attend reconvening following the 30-day recess after a regular session.
>
> The Legislature may not provide retirement benefits based on any portion of a monthly salary in excess of

500 dollars paid to any member of the Legislature unless the member receives the greater amount while serving as a member in the Legislature. The Legislature may, prior to their retirement, limit the retirement benefits payable to members of the Legislature who serve during or after the term commencing in 1967.

When computing the retirement allowance of a member who serves in the Legislature during the term commencing in 1967 or later, allowance may be made for increases in cost of living if so provided by statute, but only with respect to increases in the cost of living occurring after retirement of the member, except that the Legislature may provide that no member shall be deprived of a cost of living adjustment based on a monthly salary of 500 dollars which has accrued prior to the commencement of the 1967 Regular Session of the Legislature.

Government Code Section 9359.1(a), as amended in 1963 and prior to its amendment in 1982, provided:

The retirement allowance for a member all of whose credited service was rendered as a Member of the Senate or Assembly except as provided in subdivision (d) is an annual amount equal to five percent (5%) of the compensation payable, at the time payments of the allowance fall due, to incumbent Members of the Senate or Assembly, multiplied by the number of years of service with which the member is entitled to be credited at the time of his retirement not to exceed fifteen (15) years. In no event shall any retirement allowance payable under this chapter to any such member exceed the compensation payable to Members of the Legislature at the time the payment of the allowance is made, except that the retirement allowance of any such member who serves more than 15 years shall be increased by an amount equal to 3 percent of the compensation payable, at the time payment of the allowance falls

due, to incumbent Members of the Senate or Assembly for each year or fraction of a year in excess of 15 years.

Government Code Section 9359.11, as enacted in 1966, effective January 1, 1967, provides:

> Any contrary provisions of Section 9359.1 notwithstanding, in computing the retirement allowance of a legislator member of the Legislators' Retirement System whose service as a legislator ended prior to the term commencing in 1967, the salary to which the applicable formula shall be applied shall be five hundred dollars ($500) per month, and any increase in salary of legislators above such amount shall be disregarded for such purpose.

Government Code Section 9360.9, as enacted in 1963, effective January 1, 1964, provides:

> Notwithstanding any other provisions of this chapter the provisions of this section shall be applicable to all allowances granted by this chapter commencing with each installment paid or payable on or after January 1, 1964.
>
> On or before January 1, 1964, the board shall adjust the amount of the allowances payable during the 1964 calendar year to reflect any increase in cost of living occurring between the 1963 calendar year and the 1955 calendar year, inclusive, and any increase resulting from such adjustment shall be payable commencing with each installment of allowances paid or payable on or after January 1, 1964. On or before January 15, 1965, and, on or before January 15 of each year thereafter, the amount of the allowances provided by this chapter shall be adjusted by the board to reflect any increase in cost of living occurring after January 1 of the immediately preceding calendar year. The average of the separate indices of the cost of living for Los Angeles and San Francisco, as published by the United States Bureau of Labor Statistics shall be used as the

basis for determining the changes in the cost of living. The cost-of-living increase shall equal or exceed 1 percent before any adjustment is made in the allowance. The calendar year 1954 shall be used as the base year in computing any annual adjustment. The annual adjustment made on or before January 15, 1965 and made on or before January 15 of each calendar year thereafter shall correspond to the average annual change in the calendar year immediately preceding the year during which the adjustment shall be effective. The adjustment made on or before January 1, 1964, shall correspond to the total of the average annual changes in each calendar year from the 1955 calendar year to the 1963 calendar year, inclusive.

The adjustment provided by this section shall be made only if it operates to effect an increase over the allowance payable for the calendar year immediately preceding.

No. 83-931

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# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1983

DON A. ALLEN, SR., STANLEY ARNOLD, HALE A. ASHCRAFT, JOHN C. BEGOVICH, RUTH CASEY, CLAYTON A. DILLS, FRANCES THELMA DONNELY, PEGGY P. DONOVAN, F. DOUGLAS FERRELL, MYRON H. FREW, MARY C. GAFFNEY, CHARLES B. GARRIGUS, LUTHER E. GIBSON, BURT HENSON, RUTH HOLMES, PAUL J. LUNARDI, STANLEY PITTMAN, THOMAS M. REES, EDWIN J. REGAN, W. BRYON RUMFORD, SR., HAROLD T. SEDGWICK, PHILIP SOTO, WILLIAM F. STANTON, VERNON STURGEON, WILLIAM SYLVONS, JR., HOWARD J. THELIN, JEROME R. WALDIE, ROBERT D. WILLIAMS, JOHN C. WILLIAMSON, GEORGE A. WILLSON, GORDON H. WINTON, JR., PEARCE YOUNG,
*Appellants,*

VS.

BOARD OF ADMINISTRATION OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM,
*Appellee.*

**On Appeal From Judgment of the Supreme Court of the State of California**

## MOTION TO DISMISS OR AFFIRM

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## QUESTION PRESENTED

Appellants, California legislators who retired at the end of 1966 and presently are on pension based on their *highest salary during service,* plus annual cost-of-living adjustments, are claiming unconstitutional impairment of their "pension contracts" by a 1966 California constitutional amendment which permitted higher salaries after Appellants' retirement limited the computation base for Appellants' pensions to their *highest salary during service,* plus annual cost-of-living adjustments.

The question presented is, "Did the California Supreme Court correctly hold that the 1966 amendment did not impair Appellants' "pension contracts", because they *could not reasonably expect,* under the circumstances, that a dormant statute, which based pensions on *current legislative salaries* but was inoperative between 1954-1966, would suddenly apply to their pensions after the 1966 amendment nearly tripled the previously frozen legislative salaries?"

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No. 83-931

# In the Supreme Court

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# United States

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DON A. ALLEN, SR., STANLEY ARNOLD, HALE A. ASHCRAFT, JOHN C. BEGOVICH, RUTH CASEY, CLAYTON A. DILLS, FRANCES THELMA DONNELY, PEGGY P. DONOVAN, F. DOUGLAS FERRELL, MYRON H. FREW, MARY C. GAFFNEY, CHARLES B. GARRIGUS, LUTHER E. GIBSON, BURT HENSON, RUTH HOLMES, PAUL J. LUNARDI, STANLEY PITTMAN, THOMAS M. REES, EDWIN J. REGAN, W. BRYON RUMFORD, SR., HAROLD T. SEDGWICK, PHILIP SOTO, WILLIAM F. STANTON, VERNON STURGEON, WILLIAM SYMONS, JR., HOWARD J. THELIN, JEROME R. WALDIE, ROBERT D. WILLIAMS, JOHN C. WILLIAMSON, GEORGE A. WILLSON, GORDON H. WINTON, JR., PEARCE YOUNG,

*Appellants,*

VS.

BOARD OF ADMINISTRATION OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM,

*Appellee.*

**On Appeal From Judgment of the Supreme Court of the State of California**

## MOTION TO DISMISS OR AFFIRM

### I

### JURISDICTION

The jurisdiction of the Court in this matter appears doubtful because Appellants' challenge is to a *judicial interpretation* of a California statute and constitutional

provision by the California Supreme Court. Appellants challenge the fact that the California Supreme Court followed a California precedent case which upheld Article IV, Section 4 of the California Constitution as amended in 1966. In essence, they challenge the decision because it allegedly did not follow the reasoning of a more recent California case that dealt with a different statute and different facts, rather than directly challenging a statute.

The appeal in this case presents nothing more than a claim of "impairment by judicial decision" which presents no federal question for which this Court can take jurisdiction.

## II

## STATEMENT OF THE CASE

Appellants are California legislators who retired on or before December 31, 1966 and since their retirement have received (and are now receiving) pensions based on the salary during their service which was fixed by the California Constitution until December 31, 1966. (California Constitution, Article IV, Section 2(b), as in force until December 31, 1966.) Their pensions were and are augmented by annual cost-of-living adjustments (California Government Code Section 9360.9, Jurisdictional Statement, Appendix, p.40).[1] The salary during Appellants' service was $6,000.00 on an annual basis. It could be increased only by a constitutional amendment. From 1954 until 1966, California voters voted down several attempts to increase the legislators' salaries. During the same period legislators' pensions could increase only if salaries in-

[1]All further references to statutes are to the California Government Code unless otherwise so stated. All references to the "Appendix" are to the Appendix attached to Appellant's Opening Brief.

creased. This never happened (Section 9359.1[a], Jurisdictional Statement, Appendix, p. 39).

In 1963 the California Legislature enacted California Government Code § 9360.90 (Jurisdictional Statement, Appendix, p. 40). This section gave Appellants a so-called "catch-up" on the cost-of-living increases that had occurred since 1954, in addition to giving them annual cost-of-living adjustments from January 1, 1964, onwards, which they are today receiving.

The provision of the Legislators' Retirement Law which tied pension increases to salary increases (Section 9359.1[a], Jurisdictional Statement, Appendix, p. 39), continued to be on the statute books, but had no effect since salaries were not increased.

In 1966 (effective January 1, 1967), the voters of California approved a constitutional amendment which gave the Legislature the power to set its own salaries by two-thirds majority vote. At the same time the amendment provided that the pensions of the legislators who had served before January 1, 1967 would not be based on the new higher salaries. (California Constitution, Article IV, Section 4, "Jurisdictional Statement", Appendix, p. 38-39). Legislation implementing this constitutional amendment, likewise became effective January 1, 1967. (Section 9359.11, Jurisdictional Statement, Appendix, p. 40, and Section 8901, setting legislative salaries at $16,000 per year, effective Jan. 2, 1967).

This constitutional amendment and the implementing legislation originated in the very Legislature in which Appellants then served.

The Legislature, however, did not, in 1966, restrict the basic pensions of constitutional officers of the State to the highest salary during service, but left the basic pension subject to adjustment by tying it to the salary of the current incumbent. (Section 9359.1[b]).

None of the Appellants retired after January 1, 1967. Between that time and prior to the institution of this lawsuit in 1979, Appellants claimed and received their pensions and cost-of-living adjustments based on the salaries at which they had served.

In 1969, the widow of a legislator (Lyon) who had retired in 1966 and had received a pension based on the $6,000.00 annual salary, augmented by cost-of-living increases, claimed that she was entitled to a pension based on the new $16,000.00 salary for legislators which became effective January 2, 1967. She brought suit alleging that the 1966 amendments to the California Constitution which limited the base of her pension to the $6,000.00 annual salary were repugnant to the "contract clause" of the United States Constitution (*Lyon v. Flournoy,* (1969) 271 Cal.App. 2d 774, at 779).

The California Court of Appeal held that the 1966 amendments were not an impairment of Lyon's pension contract, notwithstanding that during Lyon's term of service Section 9359.1(a), which tied pension increases to salary increases, had been on the statute books. The section had been "dormant" (*Lyon v. Flournoy, supra,* at 785) since the voters had declined to raise salaries. The California Court of Appeal stated that the purpose of Section 9359.1(a) had been achieved by the enactment of Government Code Section 9360.9 which provided the standard of

living "catch-up" from 1954 through 1963 and the annual cost-of-living adjustment from 1964 onward. The 1966 amendments, by denying the pre-1967 retired legislators pensions based on the new $16,000.00 salary, merely withheld from them an unanticipated windfall (*Lyon, supra,* at 785, 787).

The California Court of Appeal relied for their decision on principles stated by this Court:

> "The beneficiaries' rights were measured not by rigid literal fulfillment of the contract, but by its 'just and reasonable purport'. (*Home Building & Loan Assn. v. Blaisdell* . . . 290 U.S. at 429 . . .) The law making power chose to confine beneficiaries to the gain 'reasonably to be expected from the contract' and to withhold 'unforeseen advantages' which had no relation to the real theory and objective of the fluctuation provision. (*City of El Paso v. Simmons,* 379 U.S. at 515 . . .)." (*Lyon v. Flournoy, supra,* at 787.)

In 1978 the California Supreme Court decided in *Betts v. Board of Administration,* (1978) 21 Cal.3d 859, that Betts, a former State Treasurer, under a wholly different set of circumstances, had a reasonable expectation of receiving a pension based on the salary of the current incumbent State Teasurer, plus a cost-of-living adjustment, instead of a pension based on Betts' highest salary level while he served in office, Betts' final term of office had expired December 31, 1966. In 1974 the California Legislature amended Section 9359.1(b) in a way which would have limited Betts to a pension based on the highest salary at which he served, plus a cost-of-living adjustment. It was their amendment that the California Supreme Court found to be an impairment of Betts' "pension contract" under the

circumstances of his case. The Court, however, reached that conclusion reluctantly. A pension based on the current incumbent's salary (which presumably compensates the incumbent for cost-of-living increases) *plus* an annual cost-of-living adjustment was found to be "a *double* increment of increase" and to be a "troubling result". (*Betts, supra,* at 867). The clear question of legislative intent as to constitutional officers in the *Betts* case was not available and the Court felt compelled to conclude:

> "We can only observe that the Legislature *must have intended* to provide such benefits to constitutional officers serving between 1963 and 1974 because it left in effect both of the formulae during that 11-year period." (Emphasis added.) (*Betts, supra,* at 867.)

Within a few months after the *Betts* decision became final Appellants filed claims with the Board for recomputation of their pensions based on the salaries of current incumbent legislators. After an administrative hearing on June 22, 1979 the Board declined Appellants' request, Appellants prayed for and obtained a Writ of Mandate from the Superior Court of Los Angeles County, the California Court of Appeal, Second District affirmed, but the California Supreme Court granted the Board's Petition for Hearing and reversed the Judgment of the trial court. This Appeal followed.[2]

---

[2]Under the California Rules of Court, when the Supreme Court grants a Petition for Hearing the cause is transferred from the Court of Appeal to the Supreme Court and the decision of the Court of Appeal does not have precedential effect and is not published in the Official Reports. Rule 28, Rule 976[a].

## III

## THE APPEAL PRESENTS NO SUBSTANTIAL FEDERAL QUESTION

### A. The California Supreme Court Applied Contract Clause Principles Stated By This Court

In *Allen et al. v. Board,* (1983) 34 Cal.3d 117 (Jurisdictional Statement, Appendix, p.1-19), the California Supreme Court followed California precedent (*Lyon v. Flournoy, supra*) in holding that Article I, Section 4 of the California Constitution, as amended in 1966, *did not* unconstitutionally impair the "pension contract" of Appellants. In reaching its decision the Court followed the principles stated in the decisions of this Court:

> (1) "The prohibition [of the federal contract clause] is not an absolute one and is not to be read with literal exactness like a mathematical formulae" (*Home Building & Loan Assn. v. Blaisdell* (1934) 290 U.S. 398, 428)
>
> (2) "Laws which restrict a party to those gains reasonably to be expected from the contract are not subject to attack under the Contract Clause, notwithstanding they technically alter an obligation of a contract" (*City of El Paso v. Simmons* (1965) 379 U.S. 497 at 515)
>
> (3) "The constitution is 'intended to preserve practical and substantial rights, not to maintain theories'" (*Faitone Iron & Steel Co. v. City of Asbury Park* (1932) 316 U.S. 502, 514, as quoted in *City of El Paso, supra,* at 515)

By challenging the California Supreme Court's decision Appellants are challenging these principles:

(1) Contrary to the first principle stated above, Appellants are urging this Court to read the California statutes on the books in 1966 with "literal exactness" as follows:

(a) Section 9359.1(a) was on the books in 1966 and provided as pension computation base the salary of the current incumbent.

(b) Section 9360.9 was on the books in 1966 and provided for cost-of-living adjustments to legislators' pensions by a "catch-up" from 1954-1963 and regularly thereafter from 1964 onwards.

(c) Since both were on the books both must be applied from here to eternity. The people of the State of California may not take into consideration that the annual cost-of-living adjustment and the "catch-up" were enacted *because* there was no effective pension increase under Section 9359.1(a) from 1954 to 1963.

(2) Contrary to the second principle stated above, Appellants are urging this Court to hold that during their term of service until December 31, 1966 Appellants had the *reasonable expectation* that they would receive:

(1) a pension computed on current incumbents' salaries as soon as legislators' salaries would be raised under any circumstances and for reason whatsoever, at at any time in the future;

(2) *plus* a "catch-up" for the lack of pension increase from 1954-1963;

(3) *plus* a regular annual cost-of-living increase based on current incumbent legislators' salaries.

(3) Contrary to the third principle stated above, Appellants are urging this court to maintain the theory that when two statutes are in existence at the same time and both on their face provide a benefit, then the persons mentioned as beneficiaries are, by force of the Federal Contract Clause, entitled to both benefits regardless of the legislative intent and actual operation of these statutes and regardless of reason and common sense.

Appellants are at present receiving substantial pensions augmented by annual cost-of-living increase adjustments. They have received these pensions for these past seventeen years. There is no substance to their claim that their pension contracts are impaired. This is so because their pensions are based on their highest salary during service, together with the "catch-up" for cost-of-living from 1954-1963, plus the annual cost-of-living adjustments since 1964. They are not based on a formula which was of no effect during the twelve years before Appellants' retirement and which were never intended to apply simultaneously with a full scale cost-of-living protection mechanism such as Section 9360.9.

The decisions of this Court make it clear that the Federal Contract Clause permits to the states a necessary exercise of police power even over contracts protected by the clause. In this connection, "the economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts." (*El Paso v. Simmons, supra,* at 508, quoting *Home Building & Loan Assn. v. Blaisdell,* 290 U.S. at 434-435, 437.)

As permitted by these principles, the California Supreme Court considered the fiscal consequences resulting to the people of the State from Appellants' claim. Appellants had contributed 4% of their $6,000.00 annual compensation to the retirement fund. To pay these pensions based upon current salaries would have required, as the California Supreme Court pointed out, "excessive appropriations of general tax funds to maintain the retirement system's fiscal integrity" (Jurisdictional Statement, Appendix, p. 14). The

California Supreme Court found that to give Appellants pensions based on the $16,000.00 annual salary:

> "would give them a bonanza far outstripping any reasonable expectation for cost-of-living increases" and "also would afford them pension dwarfing their relatively modest contributions to the Legislators' Retirement System" (Jurisdictional Statement, Appendix, p. 14).

These fiscal considerations further negate Appellants' claim that their expectations of these multiple cost-of-living adjustments to their pensions were in any way reasonable.

**B. The California Supreme Court Followed Applicable California Precedent**

*Lyon v. Flournoy, supra* on which the California Supreme Court relied in its decision in the instant case construed Article IV Section 4 of the California Constitution, as amended 1966, and the 1966 implementing legislation concerning salaries and pensions of California legislators. *Lyon* is thus a "precedent" in the truest sense of the word involving the same constitutional and statutory provisions and involving the claim of a retired legislator regarding these provisions.

*Betts v. Board of Administration, supra,* construed the 1974 amendment to Section 9369.1(b) which governs the pension rights of constitutional officers such as the office of State Treasurer in which Betts served. The salaries of constitutional officers had been set beginning in 1961 by the Legislature under Article V, Section 22 (as amended November 8, 1960) and later Article V, Section 12 (as enacted November 8, 1966) of the California Constitution. As the

California Supreme Court clearly pointed out (Jurisdictional Statement, Appendix, p. 12) the circumstances in *Betts* were altogether different and in particular there was no history of an inoperative pension increase statute surviving, "dormant," on the statute books while its intended purpose was being achieved by a new statute providing for a "catch-up" for past cost-of-living increases as well as making provision for future cost-of-living increases.

Therefore, to argue as Appellants do, that following the *precedent* of *Lyon* and declining to apply *Betts* to the different circumstances of legislators' pensions presented by the instant case was "an improper and unwarranted departure from the applicable state court precedent" (Jurisdictional Statement, p. 9) is, in a word, nonsense. *Lyon* is the *precedent* (legislators' pensions, 1966 amendment of Article IV, Section 4 of the California Constitution), *Betts* is not (pensions of constitutional officers; 1974 amendment of Government Code Section 9359.1[b]).

*Indiana ex rel. Anderson v. Brand,* (1937) 303 U.S. 95, cited by Appellants is inapposite. In that case the Indiana Supreme Court departed from a long line of its prior cases which:

> "had uniformly held that the teacher's right to continued employment by virtue of the indefinite contract created pursuant to the Act was contractual." (*Indiana, supra,* at 105).

In the instant case the California Supreme Court did the opposite: it adhered to the precedent of *Lyon v. Flournoy* (supra).

**C. Conclusion**

The "impairment" Appellants are urging this Court to consider thus consists of the decision of the California Supreme Court to follow applicable California precedent and to follow the principles announced by this Court all of which compelled the California Court to deny to Appellants the windfall claim they have made.

Appellants' claim thus does not amount to a substantial federal question and this Appeal accordingly should be dismissed.[3]

## IV

## THE APPEAL PRESENTS NO FEDERAL QUESTION

Appellants are, primarily, attacking a *judicial decision*, rather than a "law" of the State of California. The tenor of their "Jurisdictional Statement" is that the California Supreme Court should have followed "the reasoning and holding" of the *Betts case*. (Jurisdictional Statement, p. 13; see also p. 6, p. 9, 17-18.) The reasoning of *Betts*, i.e., the inference from the simultaneous existence of the two statutes that both had to apply simultaneously, is referred to as "controlling". (Jurisdictional Statement, p. 13, 14, 18.) The entire difference between the constitutional and statutory scheme of salaries and pensions for legislators vis-a-vis salaries and pensions for constitutional officers is brushed aside. Nothing counts in Appellants' argument except that two statutes were simultaneously on the books in *Betts* and so, since in *Betts* the two statements were held to be simultaneously in force, two statutes simultaneously on the books must in all cases, under any circumstances, and at all times, be held to be simultaneously in force.

[3] If this appeal is treated as a Petition for Writ of Certiorari the Petition should be denied.

Appellants' entire attack on the California Supreme Court's decision in the instant case is focused on this argument. What the statutes say, what their legislative history and intent may be is brushed aside by them as irrelevant. The error of the California Supreme Court was to fail to recognize Appellants' "simultaneity rule" and to apply it in the instant case. In this, Appellants are attacking purely a point of legal reasoning, of the rules governing the application of case law. Their "precedent" (*Betts*) does not even involve the same constitutional and statutory provisions on which the California Supreme Court decided the instant case.

It is therefore clear Appellants are attacking a *judicial decision* as causing the impairment of their "pension contracts".

It has been settled for close to 140 years that alleged impairment of contract by judicial decision raises no federal question: ". . . the power delegated [to the U.S. Supreme Court] is for restraint of unconstitutional legislation by the states, and not for the correction of alleged error committed by their judiciary". (*Commercial Bank of Cincinnati v. Buckingham*, (1847) 46 U.S. 317. "The contract clause of the Constitution, as its words show, is directed against impairment by legislative action, not against a change in judicial decision." *Rooker v. Fidelity Trust Company*, (1923) 261 U.S. 114 at 118.[4]

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[4]While this Court has examined state judicial decisions affecting contracts in cases arising through diversity jurisdiction, this Court has "in cases . . . of which it obtains jurisdiction only on the constitutional ground [impairment of contract] and by appeal from a state court, . . . always adhered in terms to the doctrine that the word 'laws' as used in Article I, § 10, does not comprehend judicial

The California Supreme Court's construction of Article IV, Section 4 of the California Constitution, as amended 1966, is so far removed from Appellants' incessant arguments that *Betts* is "controlling" (Appellants' simultaneity rule), it is so far removed that the important case falls into the category of cases decided by Chief Justice Taft in *Tidal Oil Co. v. Flanagan,* (1923) 263 U.S. 444, at 453-545, "wherein it is claimed that a state court judgment alone, and without any law, impairs the obligation of a contract."

We respectfully submit that Appellants' attack on the judgment of the California Supreme Court in the instant case falls into that category of cases which present no federal question at all, because they attack an alleged error in a judicial decision rather than unconstitutional legislation by a state. In the absence of a federal question this Court would not have jurisdiction over this matter.

## V

## THE ARGUMENTS FOR GRANTING A PENSION WINDFALL TO APPELLANTS ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT

As shown under III and IV, Appellants, after some thirteen years of evident contentment with their pensions, opportunistically seize upon the decision of the California Supreme Court in *Betts v. Board of Administration, supra.* In doing so, they have totally ignored the basis of

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decisions." The Constitution of the United States of America, Analysis and Interpretation, Congressional Research Service, Library of Congress, ed. Lester S. Jayson, U.S. Government Printing Office, Washington: 1973, at p.385.

the decision below, namely the legislative history and the legislative intent of the statutes in question.

Appellants' tenacious insistence that the California Supreme Court must disregard a carefully reasoned precedent construing the constitutional and statutory provisions which control the pension rights of retired legislators like Appellants is so insubstantial as not to need further argument.

## VI
## CONCLUSION

We respectfully submit that the Judgment of the California Supreme Court should be affirmed.

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